

1/17/00

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
Washington D.C.

SAN MANUEL INDIAN BINGO AND CASINO

and

Cases 31-CA-23673  
31-CA-23803

HOTEL EMPLOYEES & RESTAURANT  
EMPLOYEES INTERNATIONAL UNION,  
AFL-CIO, CLC

COMMUNICATIONS WORKERS OF  
AMERICA, AFL-CIO, CLC

Party In Interest

STATE OF CONNECTICUT

Intervenor

<input checked="" type="checkbox"/>	Master File Document
<input type="checkbox"/>	Working Copy Document
<input type="checkbox"/>	Routed to _____
For Records Staff Use:	
Attachments to this Document	
Filed/Legal LegalKey Doc ID	
1567440.00121 / 1	

**MOTION TO DISMISS THE INSTANT COMPLAINT  
FOR LACK OF JURISDICTION**

**I. INTRODUCTION**

Pursuant to Section 102.24 of the Board's Rules and Regulations, the San Manuel Band of Serrano Mission Indians (erroneously named herein as the San Manuel Indian Bingo and Casino) ("Tribe" or "San Manuel") enters a special appearance in these proceedings, without prejudice to its position that the NLRB has no jurisdiction over it, for the sole purpose of filing this Motion to Dismiss the Instant Complaint for Lack of Jurisdiction. The Board lacks jurisdiction over the Tribe's governmental gaming project because its operations are wholly owned and operated by an Indian tribe and are physically located exclusively on the Tribe's Reservation. The Board has

never asserted jurisdiction over a tribal economic enterprise on reservation land before; it should not do so now.

On November 2, 1999, in his last official proclamation before stepping down, former NLRB General Counsel Fred Feinstein issued his report on cases for fiscal year 1999. The report began by discussing the instant case, noting that he (Feinstein) was using the instant matter as a test case to ask the Board to reverse its decades-long recognition of its lack of jurisdiction over Indian tribal enterprises located on tribal reservations, notwithstanding the total lack of support for his position in controlling Court or Board precedent.

San Manuel requests that the Board make findings of fact and conclusions of law, finding and concluding that it has no jurisdiction over San Manuel's operations, and that the Board enter the appropriate dismissal order.

## II. PROCEDURAL HISTORY

On January 8, 1999, the Hotel Employees & Restaurant Employees International Union ("HERE" or "Charging Party") filed the charge in Case 31-CA-23673 alleging that San Manuel violated §8(a)(1) and (2) of the Act by allowing Party-In-Interest Communications Workers of America ("CWA") access to its facility but denying similar access to the Charging Party.

On March 23, 1999, HERE filed the charge in Case 31-CA-23803 alleging that San Manuel violated §8(a)(1) and (2) of the Act by allowing CWA to communicate with its employees while denying access to HERE for the same purposes.

On September 30, 1999, the General Counsel issued a Complaint alleging that San Manuel violated §8(a)(1) and (2) of the Act. The instant matters are currently set for calendar call on or after February 14, 2000.

As noted above, on November 2, 1999, former NLRB General Counsel Fred Feinstein issued his report on cases for fiscal year 1999, discussing the instant test case seeking to persuade the Board to reverse its longstanding refusal to assert jurisdiction over Indian tribal enterprises located on tribal reservations. This report is available as a press release on the Board's web site at [www.nlr.gov](http://www.nlr.gov).

On December 9, 1999, Associate Chief Administrative Law Judge William L. Schmidt granted the State of Connecticut's motion to intervene in the case for the limited purpose of filing a brief regarding jurisdictional issues.

San Manuel now timely files this motion requesting that the Board dismiss the instant Complaint for lack of jurisdiction.

### **III. STATEMENT OF FACTS**

#### **A. The Tribe and Its Reservation**

The San Manuel Band of Serrano Mission Indians is a federally-recognized Indian Tribe. See Declaration of Tribal Chairman Deron Marquez ("Marquez Dec."), which is attached hereto as Exhibit A, at para. 2; 62 Fed. Reg. 55270 (listing of federally-recognized Tribes). President Benjamin Harrison established the Tribe's Indian Reservation by executive order in 1891.<sup>1</sup> The Tribe's Reservation today consists of approximately one (1) square mile of land located within

---

<sup>1</sup>"[T]he practice of establishing Indian reservations by Executive Order goes back at least to May 18, 1855." F. Cohen, *Handbook of Federal Indian Law*, 299 (1941) (hereinafter "Cohen"). Cohen's work is widely recognized as the premier authority on federal Indian law, and is routinely cited by the Supreme Court. See, e.g., *County of Yakima v. Confederated Bands of the Yakima Indian Nation*, 502 U.S. 251, 254 (1992); *Blatchford v. Native Village of the Noatak and Circle Village*, 501 U.S. 775, 793 (1991); *Duro v. Reina*, 495 U.S. 676, 687-88 (1990); *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408, 435 (1989); *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989).

the County of San Bernardino. The Reservation is not within the boundaries of any municipality. The federal government owns the Reservation and holds it in trust for the Tribe. The federal government recognizes the Reservation as an official Indian Reservation. The Reservation also constitutes Indian lands over which the Tribe exercises governmental authority and is the type of land upon which the Indian Gaming Regulatory Act, 25 U.S.C. §§2701 - 2721 ("IGRA"), authorizes the Tribe to conduct gaming. *See* Marquez Dec. at para. 2; 25 U.S.C. § 2703(4) (defining "Indian lands").

The Tribe is governed by a General Council consisting of all tribal members twenty one (21) years of age and older. Every adult tribal member is a member of the General Council, and conversely, every General Council member is an adult tribal member. The Tribe elects a Business Committee consisting of a Chairman, a Vice-Chairman, a Secretary-Treasurer, and two (2) committee members, all of whom are and must be tribal members. *See* Marquez Dec. at para. 3.

The Tribe's governing document is its Articles of Association, which were approved by the Secretary of Interior. *See Id.* at para. 4, and Exhibit A thereto. The Articles of Association provide that "the jurisdiction of the Band shall extend to the land now and hereafter comprised within the San Manuel Reservation." *Id.* The Articles also govern membership in the Tribe, elections, vacancies and recall, the powers of the General Council and Business Committee, tribal meetings, duties of elected officers, process for federal approval, and process for amendment of the Articles. *Id.*

#### **B. The Tribe's Economic Development Project**

The named respondent San Manuel Indian Bingo & Casino ("Casino" or "Project") is a tribal government economic development project wholly owned and operated by the San Manuel

Band of Serrano Mission Indians under IGRA. The Project is *not* a corporation, limited liability company, limited partnership, general partnership, association or any other legal entity. It is solely and exclusively a tribal governmental economic development project. The Project is located entirely within the limits of the Tribe's Indian Reservation. No third party has any interest in the ownership or operation of the Project. The Tribe does not employ a management company to conduct any operations of the Project, nor are there any third-party investors with any type of interest in the Project. *See* Marquez Dec. at para. 5.

The Project is not a private commercial enterprise. Indeed, the Tribe has never had any private commercial gaming on its reservation. Traditional and ceremonial gaming, such as "pinon" and similar games, although involving wagering, is not operated commercially and has been played by tribal members for hundreds of years. The Project is a tribal governmental program wholly and exclusively owned, operated and regulated by the Tribe pursuant to IGRA and the federally-approved San Manuel Gaming Act (hereinafter "Gaming Act"). *See* Marquez Dec. at para. 6, and Exhibit B thereto. The Tribe's Gaming Act establishes a Tribal Gaming Commission to regulate and license gaming activities, investigate wrongdoing, and perform other duties as required for the regulation of gaming on the Reservation. The Gaming Act empowers the Tribe's Commission to regulate all gaming activities on the Reservation; conduct investigations, including background investigations of employees as well as vendors, suppliers, management, and others associated with the Project; hold hearings and administer oaths; adopt regulations; and generally perform those functions that gaming commissions in other jurisdictions also perform. *See Id.*

Pursuant to the Gaming Act, the tribal government requires everyone who works in or has any function in the Project to undergo a background investigation in order to obtain a gaming license. No exceptions are made for tribal members, family members or anyone else. All Tribal

Gaming Commissioners and staff must submit to the same rigorous background tests, which are handled by an outside and independent source, in order to hold those positions. All gaming license applicants must pass an extensive background investigation as mandated by federal and tribal law which is conducted by tribal government investigators. *See Id.* at para. 7.

The Tribe, through its General Council, sets all significant policies of the Project such as establishing budgets, setting scales for salaries and wages, raises, bonuses, fringe benefits, and setting vacation and leave policies. The Tribe determines employees' general working conditions. The Tribe also conducts regular oversight of the Project and the General Manager of the Project reports to the Tribe's General Council on a regular, bi-weekly basis. *See Id.* at para. 8.

The revenues from the Project are used exclusively for tribal governmental and charitable purposes, as required by federal law. The federally-approved San Manuel Tribal Gaming Revenue Allocation Act (hereinafter "Revenue Allocation Act"), as required by IGRA, sets forth how the revenues from the Project must be used by the Tribe. *See* Marquez Dec. at para. 9, and Exhibit C thereto. The tribal governmental operations and programs funded by Project revenues include tribal administrative operations, health and medical care programs, education programs, elderly assistance programs, fire protection services, tribal law enforcement and security, tribal housing, and programs to improve the Reservation infrastructure. As discussed further below, Project revenues are generally the exclusive source of funding for these tribal governmental programs. Without such revenues these governmental programs could not exist. *See Id.*

The Project is and has been operated by tribal members in key positions, many of whom have worked their way up the ladder from entry level jobs and now have or have had positions of significant management and supervisory responsibility. Tribal members have taken law enforcement training and certification in order to work on the tribal government's security and

surveillance forces, and have taken management training courses to prepare themselves not only for gaming but for business generally. Throughout the years of its operation, tribal members have been in every facet of the Tribe's governmental gaming Project, from top to bottom. *See Marquez Dec. at para. 11.* The Tribe's Project is not the sole gaming or food service employer within commuting distance of the San Bernardino County area. Non-tribally owned and operated food service facilities and gaming facilities, including cardrooms, racetracks, and state lottery outlets, are all available sources of alternative employment for area residents. *See Marquez Dec. at para. 10.*

### **C. The Governmental Uses of Project Revenues**

For almost the first hundred years of the Reservation's existence, the Tribe had no resources. A majority of its tribal members received public assistance. Few tribal youths completed high school. Alcoholism, drug abuse, and various serious health problems were prevalent among tribal members. The Tribe's housing stock, water supply, sewage disposal, and road infrastructure were all grossly substandard. The Tribe had an extremely high rate of unemployment, as high at times as 75 percent or more. *See Marquez Dec. at para. 11.*

At one time the Tribe occupied, lived off of, and traded within, hundreds of square miles in the San Bernardino mountains and surrounding areas. That was the Tribe's economic base for thousands of years. In the late 1800s, with the assistance of the state militia and federal authorities, the Tribe's members were forced onto an approximately one square mile "reservation" located near what is now known as the city of San Bernardino. The terrain of the reservation consisted of steep, mountainous, arid land, incapable of being used for any agricultural or other economic activity. Just after the turn of the century a few acres of flat land at the base of the reservation was added by gift from a local landowner. The Tribe received another four acres in the

early 1980's before gaming on the Reservation commenced. Without those two flat parcels, it would have been impossible to operate any kind of economic enterprise on the Reservation. *See* Marquez Dec. at para. 12.

Because of the Project, the Tribe no longer has any public assistance on its Reservation. Alcohol and substance abuse is at an all-time low and declining each year (a number of tribal youth are actively involved in anti-drug programs) and the Project is a drug and alcohol free workplace. There is no unemployment among tribal members. All tribal members and their families have complete medical coverage. Education, including college attendance, is now the norm among tribal members. *See* Marquez Dec. at para. 13.

Gaming revenues have allowed the Tribe to improve the sewer and water systems on the reservation, so that now, unlike the past, these systems are safe and healthy for tribal members, their families, and guests on the Reservation. The Project has funded the Tribe's construction and improvement of roads on the Reservation. The Project's revenues pay educational costs for members, including a scholarship program for all employees and their families, including non-tribal member employees. This educational initiative includes child care, tutorial services, and a loan program. Revenues from the Project have paid for new housing for tribal members and their families. The Tribe is planning additional housing, a health care clinic, governmental offices, and a child care center, all of which will be exclusively funded by and dependent on revenues from the Project. The Tribe owns and operates a training center, offering computer classes and a library, all of which were funded by revenues from the Project. The gaming Project itself is a drug free workplace and the Tribe is committed to not serving alcohol on the premises. In addition, gaming revenues are helping the Tribe diversify into new areas of development beyond gaming, including



a project to create a repository for American Indian artifacts at the former Norton Air Force Base.

*See Marquez Dec.* at para. 14.

**D. The Tribe Has Enacted A Tribal Labor Relations Ordinance and a Tribal-State Compact With the State of California Pursuant to Federal Law**

Exercising its sovereign right to regulate the physical presence of non-tribal members on its Reservation, and to regulate economic activity on its Reservation and in its governmental economic development project, on September 28, 1999, the Tribe adopted a Tribal Labor Relations Ordinance regulating labor relations in the Tribe's Project. *See Marquez Dec.* at para. 15, and Exhibit D thereto. The Tribal Labor Relations Ordinance assures that eligible tribal gaming employees will have the right to organize for collective bargaining. The Ordinance, among other things, defines unfair labor practices for both the Tribe and the unions, provides unions access to eligible employees, provides for secret ballot elections and establishes a binding dispute resolution mechanism. *See Id.*

**IV. ARGUMENT**

**A. The NLRA Does Not Apply to Indian Gaming Enterprises Located on Tribal Land**

**1. *The Board Lacks Statutory Jurisdiction Over Indian Tribes Because They Are Not Employers Under the NLRA***

The unfair labor practices delineated in §8(a) of the Act apply only to an "employer," as statutorily defined. Section 2(2) of the Act provides that the statutory definition of "employer" "shall not include the United States or any wholly owned government corporation, or any Federal

Reserve Bank, or any State or political subdivision thereof...." Thus, the Board may not assert jurisdiction over any of these listed enterprises.

Indian tribes have long been recognized as "distinct, independent political communities, having territorial boundaries, within which their authority is exclusive." *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832). *See also, U.S. v. Mazurie*, 419 U.S. 544, 557 (1975) (finding that tribes "are unique aggregations possessing attributes of sovereignty over both their members and their territory."). The Board, relying on Cohen's seminal treatise, *Handbook of Federal Indian Law, supra*, has recognized that Indian tribes are sovereign, noting three fundamental principles of sovereignty: 1) that an Indian tribe possesses all the powers of a sovereign state; 2) that conquest has rendered the tribes subject to the legislative power of the United States and has terminated a tribe's external powers, e.g., treaty making, but does not affect the tribe's internal sovereign rights, e.g., local self-government; and 3) that a tribe's sovereign powers are subject to qualification by treaties and *express* Congressional acts but are otherwise vested in the tribe and its organs of government. *Fort Apache Timber Co.*, 226 NLRB 503, 505 (1976) (emphasis added).

The Board has previously recognized that Indian tribes constitute a "political subdivision" under §2(2). As such, it has consistently held that it lacks jurisdiction over tribes and their self-directed enterprises located on the reservation. *Southern Indian Health Council*, 290 NLRB 436, 437 (1988); *Fort Apache Timber Co.*, 226 NLRB 503, 506 (1976).

In *Fort Apache*, the Board faced the issue of whether it had jurisdiction over a tribal timber business located wholly within the boundaries of the tribal reservation. 226 NLRB at 503. The issue arose when a union petitioned to represent a unit of employees employed by the tribal enterprise in question. *Id.* That enterprise was owned and operated by the White Mountain Apache Tribal Council. *Id.* The Council was comprised of a "chairman and vice chairman, elected by

popular vote of the Tribe, and nine Council members popularly elected from four districts.” *Id.* All members of the Council were White Mountain Apache Tribal members. *Id.* All business decisions, including the wages and working conditions of the employees at the tribal enterprise, were determined by the Tribal members elected to the Fort Apache Tribal Council. *Id.*

The Board declined to assert jurisdiction. *Id.* at 506. In reaching its holding, the Board analyzed the tribe's sovereign status and concluded that the tribe was a "political subdivision" within the meaning of §2(2). *Id.* at 506 n. 22. The Board's analysis apparently relied on the test articulated by the Supreme Court in *NLRB v. The Natural Gas Utility District of Hawkins County*, 402 U.S. 600 (1971). Under the *Hawkins* test, an entity is exempt as a governmental entity if its is: "(1) created directly by the State, so as to constitute departments or administrative arms of the government, or (2) administered by individuals who are responsible to public officials or to the general electorate." 226 NLRB at 504-05 n. 5. The Board in *Fort Apache* concluded that it lacked jurisdiction over the tribe's enterprise because it was "an entity administered by individuals directly responsible to the Tribal Council." *Id.* at 506 n.22.

In *Southern Indian Health Council*, the Board extended its *Fort Apache* holding to a health care clinic operated on a reservation by a consortium of Indian tribes. 290 NLRB at 436. This case also came before the Board on a petition for representation. *Id.* The clinic was a nonprofit corporation directed by a board composed of members of federally-recognized southern California Indian tribes. *Id.* The clinic kept its own payroll; working conditions were set by a program director. *Id.* Significantly, although the day-to-day operations of the tribal enterprises in both *Southern Indian* and *Fort Apache* were controlled by department managers who were not tribal members, the Board concluded that because the Tribe's governmental elected Tribal Council "establishes and controls significant employment policies," the tribal enterprises were controlled by

the Tribes and were thus exempt from the Act's coverage. *Id.* The Board noted that in *Fort Apache* it had, "found that a tribal council is a 'government' and thus that an entity administered by individuals directly responsible to a tribal council is exempt . . . as a 'governmental entity.'" *Id.* at 437.

The Board has asserted jurisdiction over a tribal enterprise in three cases, none of which are applicable to the facts herein. See *Yukon Kuskokwim Health Corp.*, 328 NLRB No. 101 (June 18, 1999); *Sac & Fox Industries*, 307 NLRB 241 (1992); *Devil's Lake Sioux Mfg. Corp.*, 243 NLRB 163 (1979). In each of these cases, all of which also arose in a representational context, the enterprise at issue was either not located on tribal land (*Yukon, Sac & Fox*) or was not wholly owned by the tribe nor completely controlled by the tribal government (*Devil's Lake*). Accordingly, the Board has two distinct lines of consistent precedent regarding jurisdiction over Indian tribal enterprises. If the tribal enterprise is located on tribal land, is owned and operated by a tribal government, and exists pursuant to a legislative act, as in the instant case, the Board will not and cannot assert jurisdiction. On the other hand, the Board will assert jurisdiction over tribal enterprises not on tribal land and not wholly owned and operated by the tribe.

Here, the facts easily place this case within the first line of cases. The tribal government is the sole owner and operator of the Project, which is a tribal government enterprise. The Casino is located entirely within the boundaries of the San Manuel Indian Reservation. The United States recognizes the Tribe as a self-governing Indian Tribe pursuant to its inherent sovereign authority and its Articles of Association. See *Marquez Dec.* at paras. 2, 4-5, and Exhibit A thereto. The Tribe's governmental gaming project operates pursuant to a federal statutory structure that preempts the field of Indian gaming. See *Gaming Corp. of America v. Dorsey & Whitney*, 88 F.3d

536, 544 (8th Cir. 1996) (IGRA's "text and structure" and "its legislative history" leave no doubt that "Congress intended [that] it completely preempt" the field of Indian gaming).

The Tribe's General Council sets all significant policies of the Project, including establishing budgets, setting scales for salaries and wages, raises, bonuses, and fringe benefits, and setting vacation and leave policies. The Tribe determines employees' general working conditions. A tribally appointed Board conducts regular oversight of the Project and the General Manager of the Project reports to the Tribe's General Council on a regular, bi-weekly basis. *See* Marquez Dec. at para. 8. The revenues from the Project are used exclusively for tribal governmental and charitable purposes, as required by federal law. *See* Marquez Dec. at para. 9; 25 U.S.C. § 2710(b)(2)(B) (expressly limiting the use of net revenues from tribal gaming projects to governmental and charitable purposes).

Thus, this matter is controlled by the Board's rulings in *Southern Indian* and *Fort Apache*, neither of which has been overturned or otherwise limited, either implicitly or explicitly. In fact, in the Board's most recent expression of its limited jurisdiction over Indian tribal enterprises, it reaffirmed the principles of *Fort Apache* and *Southern Indian*. *See, Yukon*, 328 NLRB No. 101 slip op. at 4 (finding it significant to its assertion of jurisdiction that the enterprise in question was not located on a reservation and was not brought into existence by a legislative act).

The above discussion shows that the Board, consistent with controlling Supreme Court precedent, has never asserted jurisdiction over an enterprise akin to the Casino. Accordingly, the Board is compelled to follow its own clear precedent and decline to assert jurisdiction herein.

**2. Even If Indian Tribes Are Considered Employers Under the NLRA, the NLRA Does Not Apply to Labor Relations Issues on Tribal Lands**

**A. Congress Did Not Intend That the NLRA Apply to Tribal Lands**

As previously stated, the Board has found that an Indian tribe is a sovereign and that its sovereign powers are subject only to qualification by treaties and express Congressional acts but are otherwise exclusively vested in the tribe and its organs of government. *Fort Apache*, 226 NLRB at 505. Regarding the question of Indian sovereignty, one court recently noted that "it is clearly established law that Indian tribes do not derive their sovereign powers from congressional delegation. Rather, tribal sovereignty is inherent and tribes retain 'attributes of sovereignty over both their members and their territory, to the extent that sovereignty has not been withdrawn by federal statute or treaty.'" *NLRB v. Pueblo of San Juan*, 30 F.Supp.2d 1348, 1352 (D.N.M. 1998) (citing *Iowa Mutual Ins. Co. v. La Plante*, 480 U.S. 9, 14 (1987); *United States v. Wheeler*, 435 U.S. 313, 323). See also *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 60 (1978).

In this vein, the Supreme Court has reiterated that an Indian tribe's sovereign authority is abridged only by express statutory language or by a "clear indication" to that effect in the statute's legislative history. *Iowa Mutual*, *supra*, 480 U.S. at 17-18. See also *U.S. v. Dion*, 476 U.S. 734, 739-40 (1986); *Santa Clara Pueblo v. Martinez*, 436 U.S. at 58-59 (holding that a waiver of sovereign status "cannot be implied but must be unequivocally expressed"); *Bryan v. Itasca County, Minnesota*, 426 U.S. 373 (1976). Indeed, silence in the statutory language and legislative history is insufficient to establish that Congress intended to abrogate tribal sovereignty. *Iowa Mutual*, *supra*, 480 U.S. at 18; *Burlington Northern v. Blackfeet Tribe*, 924 F.2d 899, 905 (9<sup>th</sup> Cir. 1992), *cert denied*, 505 U.S. 1212 (1992) (holding that "the silence as to Indian tribes does not 'clearly' indicate

Congress intended to restrict tribal taxation; more likely it indicates Congress did not consider the subject.").

Both the NLRA and its legislative history are utterly silent on whether it applies to Indian tribes. *See Pueblo of San Juan, supra*, 30 F.Supp. 2d at 1354; *Sac & Fox Industries, supra*, 307 NLRB at 242. Because the NLRA is silent on this subject, it is clear that Congress never specifically intended that the NLRA would apply in derogation of a tribe's sovereignty over its own territory. This is perfectly consistent with the Board's decisions in *Fort Apache* and *Southern Indian*, which hold that the Board has no jurisdiction over tribal enterprises operating on tribal lands. To hold otherwise would contradict clear Supreme Court precedent, as well as the Board's own precedent, and would impermissibly infringe upon the inherent sovereignty of the Indian nation.

**B. *Regulation of Labor Relations Is Within the Tribe's Power to Regulate Commerce***

As a sovereign, an Indian tribe has the inherent authority to regulate the manner in which commerce is conducted within its territorial limits. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982) (holding that a tribe's power to tax business conducted on the reservation derives in part from "the tribe's general authority, as sovereign, to control economic activity within its jurisdiction"). For this reason, the *Merrion* court noted the "conceptual difficulties" that arise when trying to review tribal actions under the Commerce Clause. *Id.* at 153.

*Cotton Petroleum v. New Mexico*, 490 U.S. 163 (1989), took *Merrion* a step further. *Cotton* arose out of essentially the same facts as *Merrion* – a severance tax on energy leases on the Jicarilla reservation in New Mexico. 490 U.S. at 166. However, *Cotton* specifically held that the

Interstate Commerce Clause does not apply to Indian tribes: "The objects to which the power of regulating commerce might be directed; are divided into three distinct classes - foreign nations, the several states, and Indian Tribes." *Id.* at 192 (citing *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 18 (1831)).

The Court further noted that "the fact that States and tribes have concurrent jurisdiction over the same territory makes it inappropriate to apply Commerce Clause doctrine developed in the context of commerce 'among' States with mutually exclusive territorial jurisdiction to trade 'with' Indian tribes." *Id.*

The NLRA is an expression of Congress' right to regulate labor relations among the states under the Commerce Clause. *See NLRB v. Jones Laughlin Steel*, 301 U.S. 1 (1937); NLRA §1. In *Jones Laughlin Steel*, the Supreme Court upheld the Wagner Act. 301 U.S. at 49. In doing so, it held that the Act was a constitutionally permissible means of regulating interstate commerce. *Id.* at 29-30. However, as noted, an Indian tribe has a sovereign right to regulate commerce within its own territory. *Merrion, supra*, 455 U.S. at 137. As discussed above, the only way in which Congress usurps a tribe's sovereign right to do so is if Congress has clearly abrogated that right through express statutory language or through a clear statement of its intent as derived through legislative history. *Iowa Mutual, supra*, 480 U.S. at 17-18.

Again, the NLRA and its legislative history are silent as to its application to Indian tribes. Furthermore, the NLRA, by its terms, applies solely to acts which affect commerce. Section 2(6) of the Act defines "commerce" as:

trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between



points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

*Cotton* teaches that the Constitution regulates three separate forms of commerce: interstate commerce, foreign commerce, and Indian tribal commerce. The definition of "commerce" contained in the NLRA touches upon two of those – interstate and foreign. It does not touch upon Indian tribal commerce. Further, *Jones Laughlin Steel*, which determined the constitutionality of the NLRA, only references interstate and foreign commerce, not tribal commerce. Accordingly, Congress did not intend that the NLRA would usurp an Indian tribe's sovereign right to regulate commerce within its own territory. This approach is also perfectly consistent with the approach taken by the Board in *Fort Apache* and *Southern Indian*.

***C. Earlier Supreme Court Precedent Stating That Statutes of General Applicability Apply to Indians Has Been Implicitly Overruled***

Previous Board decisions touching upon tribal jurisdiction issues, as well as former General Counsel Feinstein's November 1999 report, mention the Supreme Court's decision in *FPC v. Tuscarora Indian Nation*, 362 U.S. 99 (1960), as standing for the proposition that a statute of general applicability, such as the NLRA, applies to Indians and their property interests. *Tuscarora* does contain dicta regarding that proposition. However, that dicta has been implicitly overruled by several Supreme Court decisions that antedate *Tuscarora*.

*Tuscarora* involved the New York Power Authority's right under the Federal Power Act to condemn land held *in fee simple* by the Tuscarora Indian Nation. 362 U.S. at 100, 105-06. The Power Authority needed the land to build a reservoir for a hydroelectric project dictated by a treaty signed between the United States and Canada. *Id.* at 101. The tribe argued that the land could not be condemned because it was within the statute's definition of a reservation, a category of lands

specifically excluded from condemnation in the statute. *Id.* at 107. Writing for a slim five-justice majority, Justice Whittaker held that the land at issue was not part of the tribe's reservation; thus it was not specifically excluded from the Federal Power Act. *Id.* at 115.

Although that finding was dispositive, the Court went on to address the application of general statutes to "Indians" and their property. *Id.* The Court noted that it had previously held that "General Acts of Congress did not apply to Indians, unless so expressed as to clearly manifest an intention to include them." *Id.* at 115-16 (citing *Elk v. Wilkins*, 112 U.S. 94 (1884)). However, the Court then noted that more recent decisions involving taxation statutes held that those statutes applied to Indians because Congress had not specifically excluded them. *Id.* at 116-17. *See, e.g., Superintendent of Five Civilized Tribes v. Commissioner*, 295 U.S. 418 (1935); *Oklahoma Tax Commission v. U.S.*, 319 U.S. 598 (1943). Relying on these cases, the Court stated that "a general statute in terms applying to all persons includes Indians and their property interests." *Id.* at 116.

The *Tuscarora* dicta may be proper in its historical context but it has been implicitly overturned.<sup>2</sup> After *Tuscarora*, the Supreme Court has often revisited the issue of whether a statute must specifically mention Indian tribes in order to apply to them. As previously discussed, these

---

<sup>2</sup>Commentators have identified three see-saw periods of Supreme Court decisions regarding Indian tribal sovereignty. *See generally, C.F. Wilkinson, American Indians, Time, and the Law.* The first period, lasting from roughly 1820 through the 1880's, was exemplified by the "Marshall trilogy," named after Chief Justice John Marshall – *Johnson v. McIntosh*, 21 U.S. (8 Wheat) 543 (1823); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); and *Worcester v. Georgia, supra*. These cases delineated the limitations of tribal sovereignty and generally held that a tribe was entitled to its original sovereign rights other than those specifically abridged by the United States. The second period lasted from the 1880's through the early 1960's. In this era, the Court issued a number of decisions which reduced the scope of Indian sovereignty delineated by the Marshall trilogy. *See, e.g., Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903). The last period, which has lasted from the 1960's through the present day, has seen a return to the more expansive conception of tribal sovereignty developed by the Marshall trilogy. *Tuscarora*, both in terms of when it was decided and its holding, clearly falls within the second period, and thus does not represent the modern federal view of tribal sovereignty.

modern cases have uniformly held that tribal sovereignty is ceded only by express statutory language or by a clear Congressional intent as relayed through the legislative history. See, e.g., *Iowa Mutual, supra*, 480 U.S. at 17 (“the proper inference from silence . . . is that the sovereign power . . . remains intact”); *Dion, supra*, 476 U.S. at 740 (tribal rights can not be abrogated by congressional acts absent “clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty”); *Santa Clara Pueblo, supra*, 436 U.S. at 58-60; *Bryan, supra*, 426 U.S. 373. Further, as also previously discussed, silence does not and may not evidence Congressional intent. To the contrary, silence usually indicates that Congress probably never discussed the issue. *Iowa Mutual, supra*, at 17; *Burlington Northern, supra*, at 905. These cases, all of which were decided between 18-30 years after *Tuscarora*, certainly modify, if not overrule, *Tuscarora*. It is utter folly to seriously argue that 40 year old dicta supercedes a battery of much more recent Supreme Court precedent.

In fact, the Tenth Circuit has held that *Tuscarora* has been overruled. In *Donovan v. Navajo Forest Products*, the Secretary of Labor appealed a determination of the Occupational Safety and Health Commission (“OSHC”) which had held that the Occupational Safety and Health Act (“OSHA”) was inapplicable to the tribal economic enterprise. 692 F.2d 709 (10<sup>th</sup> Cir. 1982). The court agreed with the OSHC and held that tribal sovereignty prevented OSHA from applying to a tribal economic enterprise located on the Navajo reservation. *Id.* The court found that the economic enterprise was an instrumentality of the tribal government scheme and existed to advance social, economic, and educational goals for the Navajo tribe. *Id.* at 710.

On appeal, the Secretary of Labor relied on *Tuscarora*. The court held that *Tuscarora* had been overruled, or at least limited, by *Merrion*. As noted above, *Merrion* involved a tribe's

power to impose a severance tax on energy production on tribal land. 455 U.S. at 133. The Supreme Court upheld the tribe's power to impose the tax. *Id.* at 159. In reaching that result, the Court held that a "hallmark of tribal sovereignty is the power to exclude non-Indians from Indian lands, and that this power provides a basis for tribal authority to tax." *Id.* at 141. Based on this clear expression, upon which both the majority and the dissenters in *Merrion* agreed, the *Navaho Forest* court held that the *Tuscarora* dicta regarding statutes of general applicability had been implicitly overruled. *See also EEOC v. Cherokee Nation*, 871 F.2d 937, 938 n. 3 (10<sup>th</sup> Cir. 1989).

In contrast, the Ninth Circuit has continued to apply the *Tuscarora* dicta to cases involving whether federal statutes of general applicability apply to tribal enterprises on tribal lands. *See Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113 (9<sup>th</sup> Cir. 1985) (holding OSHA applicable to a tribal enterprise on tribal lands); *Dep't of Labor v. OSHC*, 935 F.2d 182 (9<sup>th</sup> Cir. 1991) (OSHA); *Lumber Industry Pension Fund v. Warm Springs Forest Products*, 939 F.2d 683 (9<sup>th</sup> Cir. 1991) (holding ERISA applicable to a tribally-owned enterprise on tribal lands). The Ninth Circuit acknowledges that the key *Tuscarora* language is dicta. *See Cour d'Alene*, 751 F.2d at 1115. However, it apparently continues to rely on that outdated dicta only because "it is dictum that has guided many of our decisions." *Id.*

The Ninth Circuit has also demonstrated that it is willing to break from *Tuscarora*. In *Burlington Northern*, the court held that three Indian tribes had the sovereign power to tax Burlington Northern's on-reservation railroad right-of-ways. 924 F.2d at 900. Burlington argued that Congress implicitly divested the tribes of such power in the Railroad Revitalization and Reform Act of 1976. *Id.* at 905. In reaching its holding, the court relied upon *Merrion* and noted that "a proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent." *Id.* at 904

(citing *Merrion*, 455 U.S. at 149 (citing *Santa Clara Pueblo*, 436 U.S. at 60)). The court then reviewed the statutory scheme and its legislative history, and determined that it was silent on the topic of Indian tribes. *Id.* at 905. The court then found that such silence does not indicate that Congress meant to apply the regulatory scheme to Indian tribes and refused to so apply it. *Id.*

The language in *Tuscarora* relied upon by General Counsel is 40 year old dicta that has been superceded by other Supreme Court decisions and has been implicitly overruled. While the Ninth Circuit does, to some extent, still follow *Tuscarora*, it does so primarily for reasons of intra-Circuit *stare decisis*. It has even indicated a willingness to not follow *Tuscarora*. Accordingly, General Counsel's misplaced reliance upon *Tuscarora* and the Ninth Circuit decisions applying it is inappropriate.

**D. Even if *Tuscarora* Applies, the Casino Falls Within Its Exceptions**

**1. *Applying the NLRA to the Tribe Would Touch Exclusive Rights of Self-Governance***

The Ninth Circuit has developed three exceptions to the *Tuscarora* doctrine. Specifically, the Court has held that a generally applicable statute will not apply to Indians on reservations without Congress' express intent to do so if:

(1) the law touches exclusive rights of self-governance in purely intramural matters; (2) the application of the law to the tribe would "abrogate rights guaranteed by Indian treaties"; or (3) there is proof by legislative history or some other means that Congress intended [the law] not to apply to Indians on their reservations.

*Coeur d'Alene*, *supra*, 751 F.2d at 1116 (citing *U.S. v. Farris*, 624 F.2d 890, 893-94 (9th Cir. 1980)). Here, there is no express Congressional intent to apply the NLRA to Indian tribes on reservations. See *Pueblo of San Juan*, 30 F.Supp.2d at 1354; *Sac & Fox Industries*, 307 NLRB at

242. Accordingly, assuming *arguendo* that the Ninth Circuit's interpretation of *Tuscarora* applies to this matter, if any of these exceptions likewise apply, then *Tuscarora* would not confer NLRA jurisdiction.

The Ninth Circuit's first exception asks whether applying a federal statute to a tribe would touch on "exclusive rights of self-governance in purely intramural matters ...." This test is met where "the tribe's decision-making power is usurped." *Lumber Industry Pension Fund v. Warm Springs Forest Products Industries*, 939 F.2d 683, 685 (9th Cir. 1991).

Here the NLRA will usurp the tribe's decision-making power. Specifically, the NLRA's requirement to bargain will transfer certain decision making to employee collective bargaining representatives. Section 8(d) of the NLRA requires employers to bargain regarding "wages, hours, and terms and conditions of employment."

This requirement includes a duty to bargain over such fundamental employment issues as the "physical dimension of [the] working environment ... [w]hat one's hours are to be, what amount of work is expected during those hours, what periods of relief are available ... the security of one's employment ... provisions limiting an employer's power to discharge employees ... freedom from discriminatory discharge, seniority right, [and] the imposition of compulsory retirement age." *Fireboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964).

Although, "the Board cannot force an employer to make a 'concession' on any specific issue or to adopt any particular position, the employer is obligated to make some reasonable effort in some direction to compose his differences with the union ...." *NLRB v. Reed & Prince Manufacturing Co.*, 205 F.2d 131 (1st Cir. 1953). "[I]f an employer can find nothing to agree to ... and if the employer makes not a single serious proposal meeting the union at least part way, then certainly the Board must be able to conclude that this is at least some evidence of bad faith, that is,

of a desire not to reach an agreement with the union.” *Id.* It follows that unless an employer is willing to subject itself to continual charges of failure to bargain in good faith, or acts in “bad faith,” its decision-making power will be usurped by meeting, at least half way, union bargaining requests.

General Counsel argues that the Board should reverse its precedent in this case because the Tribe’s Project has some connection with interstate commerce and employs non-tribal members along with tribal members. The suggestion is that the Tribe is no longer engaged in “a purely intramural matter” and therefore no tribal rights are affected by the application of the statutes.

But a Tribe cannot generate essential governmental revenues, as Congress intended Tribes to do through Indian gaming, by doing business with itself. General Counsel ignores the fact that the Tribe’s gaming Project functions as the major, if not the exclusive, sources of income for the Tribe. As noted in the Declaration of Chairman Marquez, the Tribe’s project plays the central role in the continuation of the very existence of the Tribe as a functioning governmental entity. The Tribe’s economic Project is therefore inextricably tied to its sovereign status. The benefits generated to the Tribe by the Project, through income and employment opportunities, provide the means of attaining and retaining the Tribe’s ability to function as a sovereign government. For that reason, operating the Project by the Tribe is indeed a matter of internal self-governance and therefore an “intramural” matter. The Tribe’s economic development project should not be treated as ordinary private-sector, for-profit businesses under the NLRA. And as noted above, serious questions exist regarding whether the Interstate Commerce Clause, the NLRA’s basis, allows regulation of tribal governmental economic activity on the reservation. *See* sec. IV(B), *infra*.

Former General Counsel Feinstein’s report emphasizes the Tribe’s employment of non-tribal members as a basis for bringing this action, overlooking Supreme Court and Ninth Circuit authority rejecting the notion that tribal employment of non-tribal members can in any way diminish

the tribe's sovereign governmental authority. In *United States v. Montana*, 450 U.S. 544, 566 (1981), the Court explained that “[a] tribe may regulate ... the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealings, contracts, leases, or other arrangements ....” Similarly, in *Merrion, supra*, the Court held that “Indian sovereignty is not conditioned on the assent of a non-sovereign member; to the contrary, the non-member’s presence and conduct on Indian lands are conditioned by the limitations the Tribe may choose to impose.” 455 U.S. at 147. And the Ninth Circuit has recognized that simply because “a tribe finds it necessary to look beyond its own membership for capable legal officers, and to contract for their services, should certainly not deprive it of the advantages of the rule of privilege [of tribal sovereign immunity] otherwise available to it.” *Davis v. Littell*, 398 F.2d 83 (9<sup>th</sup> Cir. 1968).

Simply because the Tribe employs non-members, operating its gaming Project for the Tribe’s economic benefit is no less a matter falling within the scope of the Tribe’s internal sovereignty. Just as the Tribe cannot do business solely with itself, it cannot look solely to its own members to create a workforce with skills, knowledge, or experience necessary to the operation of a given business. As noted above, a tribe does not relinquish sovereignty over its business operations by employing non-members. This point is illustrated by the cases upholding tribal civil jurisdiction over the activities of non-members within tribal boundaries and over the conduct and activities of those doing business with the tribe. See *Washington v. Confederated Colville Tribes*, 447 U.S. 134 (1980) (civil regulatory jurisdiction over non-Indians); *Williams v. Lee*, 358 U.S. 217, 223 (1959) (civil judicial jurisdiction over non-Indians); *Morris v. Hitchcock*, 194 U.S. 384 (1904) (upholding tribal tax on cattle owned by non-Indians grazing on tribal lands).

“When a tribe employs non-members, those non-members’ employment-related activities fall within the scope of the tribe’s sovereignty over internal matters. Certainly a tribe’s



ability to supervise and set terms and conditions of employment for its non-member employees is an aspect of its power to regulate conduct that 'has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.'" V. Limas, *Application of Federal Labor and Employment Statutes to Native American Tribes: Respecting Sovereignty and Achieving Consistency*, 26 Ariz. St. L. J. 681, 742 (1994) (quoting *Montana v. U.S.*, 450 U.S. 544, 566 (1981)).

The Tribe's view is also supported by the Eighth Circuit's decision in a similar case based upon the first two *Coeur d'Alene* exceptions. *EEOC v. Fond du Lac Heavy Equipment*, 986 F.2d 246 (8<sup>th</sup> Cir. 1993). In that case, the court reviewed the first and second *Tuscarora* exceptions and held that the Age Discrimination in Employment Act ("ADEA") did not apply to a tribal economic concern located on tribal land. 986 F.2d at 251. The court held that the tribe had an implicit right to self-governance and that right would be diluted if the ADEA was held to apply to a dispute arising on tribal lands between an applicant and a tribal economic enterprise. *Id.* at 249. Here, the dispute also involves a tribal economic enterprise doing business on tribal land. The Tribe's right to self-governance would likewise be limited by application of the NLRA to it.

For these reasons, to apply the NLRA to the Tribe would necessarily affect their "exclusive right of self-governance in purely intramural matters," *Coeur d'Alene, supra*, 751 F.2d at 1116. Thus the Board can only apply the NLRA to the Tribe if it finds "clear and reliable" evidence that Congress intended the Act to apply to tribal governments in their on-reservation activities. As the following discussion shows, the evidence is to the contrary.

**2. *There Is Evidence Through IGRA That Congress Did Not Intend the NLRA to Apply to Indian Gaming Enterprises***

The Ninth Circuit's third exception provides that a general federal statute will not apply to Indian tribes if there is proof "by legislative history or some other means that Congress intended [the NLRA] not to apply to Indians on their reservations." Here, IGRA requires that "the Indian tribe will have the sole proprietary interest and responsibility for the conduct of any gaming activity ...." 25 U.S.C. § 2710(b)(2)(A). Moreover, in adopting IGRA, Congress found that "Indian tribes have the exclusive right to regulate gaming activity on Indian lands ...." 25 U.S.C. § 2701(5). Under the NLRA, however, a tribe would have to take into consideration a union's own concept of how the gaming activity should be conducted, at least insofar as employee conduct, discipline and other workplace issues are concerned. Similarly, union concerns about seniority and promotions could conflict with tribal concerns about protecting and promoting the generation of revenue for tribal governmental programs, which is a direct goal of IGRA and is obviously an intramural concern.

Although Congress did not specifically exempt tribal gaming enterprises from the NLRA, this silence does not establish an intent to subject tribal enterprises to the provisions of that Act. When Congress adopted the IGRA in 1988, Board precedent clearly exempted tribal enterprises located on the reservation from the NLRA as governmental entities. *See Fort Apache, supra*, at 506.

IGRA's goals and structure evidence that Congress did not intend the NLRA to apply to Indian gaming enterprises, and therefore the Board should not assert jurisdiction. Moreover, the National Indian Gaming Commission, the federal agency created by IGRA and charged with overseeing Indian gaming activities, *see* 25 U.S.C. sec. 2704(b), takes the position that the proper "regulatory functions of a tribal gaming commission" include "resolv[ing] patron disputes,

employees grievances, and other problems, pursuant to the tribal gaming ordinance.” NIGC Bulletin No. 94-3 (April 20, 1994). Thus in the view of the federal agency charged with implementing IGRA, resolving employee disputes is a governmental function that may properly be performed by an arm of the tribal government.

## V. CONCLUSION

After decades of neglect and numerous failed government programs, Indian reservations are still among the poorest communities in the United States. In 1989, 47.3 percent of families on reservations or trust land lived below the poverty level, and reservation unemployment figures ranged from 30 to 90 percent. Tribal economic development projects, like the one on the San Manuel Indian Reservation, are the means by which Tribal Nations can once again become self-sufficient. The Federal Government’s established policy of encouraging tribal self-government to help address those concerns is clearly expressed in IGRA, which is effectuated by compelling Tribes to use the proceeds from their economic development project to fund tribal government operations and programs.

The Board has never before asserted jurisdiction over, and has specifically declined to assert jurisdiction over, a tribal economic enterprise wholly owned and operated by an Indian tribe and located on tribal lands. The Board will frustrate the above-noted longstanding policy of encouraging tribal self-government if it now reverses course and asserts jurisdiction over Indian gaming enterprises. Yet here, relying upon 40-year-old dicta, the General Counsel requests that the Board overrule itself and assert jurisdiction over San Manuel and, by implication, all other such tribal economic enterprises. The General Counsel's request is specious. It's reliance upon the *Tuscarora* dicta is misplaced as that dicta has been superceded, implicitly overruled, and is

contextually inappropriate at the current time. Further, the General Counsel's request raises serious commerce clause issues that could possibly have a profound significance upon much of the federal regulatory scheme based upon regulation of interstate commerce. The Board can best avoid all of the difficulties which would arise from the General Counsel's approach by finding that Indian tribal governments are not employers under the NLRA..

For these reasons, San Manuel respectfully requests that the Board grant its motion to dismiss the complaint.

Dated: January 17, 2000

BALLARD ROSENBERG & GOLPER  
KENNETH R. BALLARD  
STEPHEN L. LUEKE  
JOHN C. KLOOSTERMAN

LEVINE & ASSOCIATES  
JEROME L. LEVINE  
FRANK R. LAWRENCE  
WENDY T. PARNELL

By: 

John C. Kloosterman  
Attorneys for San Manuel Indian Bingo and  
Casino

**PROOF OF SERVICE**

I am a citizen of the United States, and am employed in the County of Los Angeles in the office of a member of the bar at whose directions this service was made. I am over the age of 18, and not a party to the within action. My business address is: 10 Universal City Plaza, Suite 1650, Universal City, California, 91608-1097.

On January 17, 2000, I served the foregoing document described as: **Motion to Dismiss the Instant Complaint for Lack of Jurisdiction** on the interested parties in this action, by placing a true copy thereof in a sealed envelope addressed as follows:

John J. Toner  
Executive Secretary  
National Labor Relations Board  
1099 14<sup>th</sup> Street, N.W.  
Washington, D.C. 20570-0001

Alice Garfield, Esq.  
Counsel for the General Counsel  
Region 31, National Labor Relations Board  
11150 W. Olympic Blvd., Ste. 700  
Los Angeles, CA 90064-1824

Richard McCracken, Esq.  
Davis Cowell & Bowe  
100 Van Ness Ave., 20<sup>th</sup> Fl.  
San Francisco, CA 94102

Communications Workers of America,  
Local 92573  
114 East Airport Drive  
San Bernardino, CA 92408

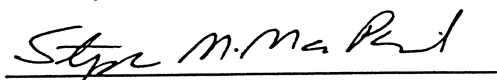
Richard T. Sponzo,  
Asst. Atty. General  
State of Connecticut  
55 Elm Street  
Hartford, CT 06106

X (BY FEDERAL EXPRESS) and personally placing such envelope in a designated Federal Express pick-up box located at 10 Universal City Plaza, Universal City, California 91608.

— (BY MAIL) and personally placing such envelope with postage fully prepaid for collection and mailing on the above-referenced date following the ordinary business practices of this office. I am readily familiar with our office's practice for collection and processing of correspondence for mailing with the United States Postal Service. In the ordinary course of business, correspondence, including said envelope, will be deposited with the United States Postal Service at Universal City on the above-referenced date.

— (BY PERSONAL SERVICE) and causing such envelope to be hand-delivered on the above date to the above addressee(s):

I declare under penalty of perjury that the foregoing is true and correct under the laws of the United States of America. Executed on January 17, 2000, at Universal City, California.

  
\_\_\_\_\_  
Stephen M. MacPhail

**EXHIBIT 1**

**DECLARATION OF DERON MARQUEZ**

I, DERON MARQUEZ, declare:

1. I am a member of the San Manuel Band of Serrano Mission Indians (hereinafter "Tribe"). I am also the elected Chairman of the Tribe's General Council, which is the Tribe's governing body. I have personal knowledge of the facts set forth herein unless otherwise stated and can and will competently testify thereto if called upon to do so at any time. This Declaration is made in support of specially appearing respondent San Manuel Band of Serrano Mission Indians' Motion for Summary Judgment.

2. The San Manuel Band of Serrano Mission Indians is a federally-recognized Indian Tribe. I am informed and believe, and thereon declare that President Benjamin Harrison established the Tribe's Indian Reservation by executive order in 1891. The Tribe's Indian Reservation today consists of approximately one (1) square mile of land located within the County of San Bernardino. The Reservation is not within the boundaries of any municipality. The Tribe's Indian Reservation is entirely owned by the federal government and held in trust for the Tribe. The federal government recognizes the Tribe's Indian Reservation as an official Indian Reservation. The Indian Reservation also constitutes Indian lands over which the Tribe exercises governmental authority and is the type of land upon which the Indian Gaming Regulatory Act authorizes the Tribe to conduct gaming.

3. The Tribe is governed by a General Council consisting of all tribal members twenty one (21) years of age and older. Every adult tribal member is a member of the General Council and every General Council member is an adult tribal member. The Tribe elects a Business Committee consisting of a Chairman, a Vice-Chairman, a Secretary-Treasurer, and two

Marquez Declaration in  
Support of Summary Judgment



(2) committee members, all of whom are, and under tribal law must be, tribal members.

4. The Tribe's governing document is its Articles of Association, which were approved by the Secretary of Interior. A true and correct copy of the Articles of Association are attached hereto as Exhibit A. The Articles of Association provide that "the jurisdiction of the Band shall extend to the land now and hereafter comprised within the San Manuel Reservation." The Articles also govern membership in the Tribe, tribal governmental elections, vacancies and recall, the powers of the General Council and Business Committee, tribal meetings, duties of elected officers, process for federal approval, and process for amendment of the Articles.

5. The San Manuel Indian Bingo & Casino (hereinafter "Project") is a tribal government economic development project wholly owned and operated by the San Manuel Band of Serrano Mission Indians under the Indian Gaming Regulatory Act. The Project is *not* a corporation, limited liability company, limited partnership, general partnership, association or any other legal entity. It is solely and exclusively a tribal governmental economic development project. The Project is located entirely within the limits of the Tribe's Indian Reservation. No third party has any interest in the ownership or operation of the Project. The Tribe does not employ a management company to conduct any operations of the Project, nor are there any third-party investors with any type of interest in the Project.

6. The Project is not a private commercial enterprise. Indeed, the Tribe has never had any private commercial gaming on its reservation. Traditional and ceremonial gaming, such as "pinon" and similar games, although involving wagering, is not operated commercially and has been played by tribal members for hundreds of years. The Project is a tribal governmental program wholly and exclusively owned, operated and regulated by the Tribe under the Indian

Gaming Regulatory Act and the federally-approved San Manuel Gaming Act. A true and correct copy of the San Manuel Gaming Act is attached hereto as Exhibit B. The Tribe's Gaming Act establishes a Tribal Gaming Commission to regulate and license gaming activities, investigate wrongdoing, and perform other duties as required for the regulation of gaming on the Reservation. The Gaming Act empowers the Tribe's Commission to regulate all gaming activities on the Reservation; conduct investigations, including background investigations of employees as well as vendors, suppliers, management, and others associated with the Project; hold hearings and administer oaths; adopt regulations; and generally perform those functions that gaming commissions in other jurisdictions also perform.

7. Pursuant to the Gaming Act, the tribal government requires everyone who works in or has any function in the Project to undergo a background investigation in order to obtain a gaming license. No exceptions are made for tribal members, family members or anyone else. All Tribal Gaming Commissioners and staff must submit to the same rigorous background checks, which are handled by an outside and independent source, in order to hold those positions. All gaming license applicants must pass an extensive background investigation as mandated by federal and tribal law which is conducted by tribal government investigators.

8. The Tribe through its General Council sets all significant policies of the Project such as establishing budgets, setting scales for salaries and wages, raises, bonuses, fringe benefits, and setting vacation and leave policies. The Tribe determines tribal employees' general working conditions. The Tribe conducts regular oversight of the Project and the General Manager of the Project reports to the Tribe's General Council on a regular, bi-weekly basis.

9. The revenues from the Project are used exclusively for tribal governmental and charitable purposes, as required by federal law. The federally-approved San Manuel Tribal Gaming Revenue Allocation Act, as required by the Indian Gaming Regulatory Act, sets forth how the revenues from the Project must be used by the Tribe. A true and correct copy of the San Manuel Tribal Gaming Revenue Allocation Act is attached hereto as Exhibit C. The tribal governmental operations and programs funded by Project revenues include tribal administrative operations, health and medical care programs, education programs, elderly assistance programs, fire protection services, tribal law enforcement and security, tribal housing, and programs to improve the Reservation infrastructure. Project revenues are generally the exclusive source of funding for these tribal governmental programs. Without such revenues these governmental programs could not exist.

10. The Project is and has been operated by tribal members in key positions, many of whom have worked their way up the ladder from entry level jobs and now have positions of significant management and supervisory responsibility. Tribal members have taken law enforcement training and certification in order to work on the tribal government's security and surveillance forces, and have taken management training courses to prepare themselves not only for gaming but for business generally. Tribal members are in every facet of the Tribe's governmental gaming Project, from top to bottom. The Tribe's Project is not the sole gaming or food service employer within commuting distance of the San Bernardino County area. Non-tribally owned and operated food service facilities and gaming facilities, including cardrooms, racetracks, and state lottery outlets, are all available sources of alternative employment for area residents.

11. I am informed and believe and thereon declare that for almost the first hundred years of the Reservation's existence, the Tribe had no resources. A majority of its tribal members received public assistance. Few tribal youths completed high school. Alcoholism, drug abuse, and various serious health problems were prevalent among tribal members. The Tribe's housing stock, water supply, sewage disposal, and road infrastructure were all grossly substandard. The Tribe had an extremely high rate of unemployment, as high at times as 75 percent or more.

12. At one time the Tribe occupied, lived off of, and traded within, hundreds of square miles in the San Bernardino mountains and surrounding areas. That was the Tribe's economic base. It had been like that for thousands of years. In the late 1800s, with the assistance of the state militia and federal authorities, the Tribe's members were forced onto an approximately one square mile reservation located near what is now known as the city of San Bernardino. The terrain of the reservation consisted of steep, mountainous, arid land, incapable of being used for any agricultural or other economic activity. Just after the turn of the century a few acres of flat land at the base of the reservation was added by gift from a local landowner. The above declarations in this paragraph 12 are made upon information and belief. The Tribe received another four acres in the early 1980's before gaming on the Reservation commenced. Without those two flat parcels, it would have been impossible to operate any kind of economic enterprise on the Reservation.

13. Because of the Project, the Tribe no longer has any public assistance on its Reservation. Alcohol and substance abuse is at an all-time low and declining each year (a number of tribal youth are actively involved in anti-drug programs), and the Project is a drug and

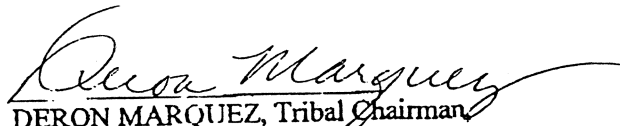
alcohol free workplace. There is no unemployment among tribal members. All tribal members and their families have complete medical coverage. College attendance, the cost of which was once out of the reach of most tribal members, is now available to all tribal members.

14. Gaming revenues have allowed the Tribe to improve the sewer and water systems on the reservation, so that now, unlike the past, these systems are safe and healthy for tribal members, their families, and guests on the Reservation. The Project has funded the Tribe's construction and improvement of roads on the Reservation. The Project's revenues pay educational costs for members, including a scholarship program for all employees and their families, including non-tribal member employees. This educational project includes child care, tutorial services, and a loan program. Revenues from the project have paid for new housing for tribal members and their families. The Tribe is planning additional housing, a health care clinic, governmental offices, and a child care center, all of which will be exclusively funded by and dependent on revenues from the Project. The Tribe owns and operates a training center, offering computer classes and a library, all of which were funded by revenues from the Project. The gaming Project itself is a drug free workplace and the Tribe is committed to not serving alcohol on the premises. In addition, gaming revenues are helping the Tribe diversify into new areas of development beyond gaming, including a project to create a repository for American Indian artifacts at the former Norton Air Force Base.

15. Exercising its sovereign right to regulate the physical presence of non-tribal members on its Reservation, and to regulate economic activity on its Reservation and in its governmental economic development project, on September 28, 1999, the Tribe adopted a Tribal Labor Relations Ordinance regulating labor relations in the Tribe's Project. A true and correct

copy of the Tribal Labor Relations Ordinance is attached hereto as Exhibit D. The Tribal Labor Relations Ordinance assures that eligible tribal gaming employees will have the right to organize for collective bargaining. The Ordinance, among other things, defines unfair labor practices for both the Tribe and the union, provides unions access to eligible employees, provides for secret ballot elections and establishes a binding dispute resolution mechanism.

I declare under penalty of perjury under the laws of the United States of America and the State of California that the foregoing is true and correct. Executed on January 16, 2000 at Palm Springs, California.

  
DERON MARQUEZ, Tribal Chairman  
San Manuel Band of Serrano Mission Indians



ARTICLES OF ASSOCIATION  
of the  
SAN MANUEL BAND OF MISSION INDIANS<sup>1</sup>

*We, the Indians of the San Manuel Band of Mission Indians of California, hereinafter referred to as the Band, in order to promote and protect our interests and common welfare, do hereby adopt these Articles of Association.*

ARTICLE I. TERRITORY

The jurisdiction of the Band shall extend to the land now and hereafter comprised within the San Manuel Reservation.

ARTICLE II. MEMBERSHIP

A. The membership of the Band shall consist of those living persons in the following categories, provided that such persons have not relinquished in writing their membership in the Band:

- (1) Persons whose names appear on the January 1, 1940 San Manuel Census Roll except that where "NE" appears on Column I opposite the name

---

<sup>1</sup>Adopted June 18, 1966; approved by the Secretary of the Interior December 1, 1966.  
Amendments: April 1, 1973; approved by the Secretary of the Interior May 14, 1973 (Article VI and Article VII.).



of an individual, such person shall not be eligible for membership.

(2) Persons of one-eighth (1/8) or more degree of Indian blood who are lineal descendants of individuals eligible for membership under (1) above regardless of whether the ancestor through whom eligibility is claimed is living or dead.

(3) Persons who have been adopted by the Band and such adoption has been approved by the Bureau of Indian Affairs.

B. If a person who is eligible for membership has been allotted on another reservation or is officially enrolled with or is a recognized member of some other tribe or band, such person shall not be enrolled. A "recognized member of some other tribe or band" is a person who, because of his affiliation with the other tribe or band has participated in elections and general activities, has received benefits or has shared in the assets of the tribe or band.

C. The official membership roll shall be prepared in accordance with an ordinance adopted by the Band and approved by the Secretary of the Interior or his duly authorized representative. Such ordinance shall contain provisions for enrollment procedures, enrollment committees, application form, approval or disapproval of application, rejection notice, appeals and provisions for keeping the roll on a current basis.

### ARTICLE III. GOVERNING BODY

The governing body of the Band shall be the General Council which shall consist of all adult members twenty-one (21) years of age or older. In addition, there shall be elected from the General Council a Business Committee consisting of a Chairman, a Vice-Chairman, a Secretary-Treasurer, and two (2) Committeemen. Members of the Business Committee shall serve a term of two (2) years or until their successors are duly elected and installed.

### ARTICLE IV. ELECTIONS

Any enrolled member of the Band, twenty-one (21) years of age or older, shall have the right to vote and if duly elected, to hold office. All nominations, and elections, whether for officers or by way of referendum, shall be conducted in accordance with an ordinance or ordinances adopted by the governing body which shall provide for the dates thereof, for polling places, election committees and their duties, absentee balloting, and other necessary requirements. Following approval of these Articles of Association by the Commissioner of Indian Affairs, election of the Business Committee shall take place at the first regular meeting of the General Council which follows the adoption of an election ordinance.

### ARTICLE V. VACANCIES AND RECALL

The General Council may, by majority vote, remove any tribal official from office who fails to carry out his Business Committee responsibilities or is found guilty of a felony in any County, State, or Federal Court, or for gross neglect of duty, or misconduct reflecting on the dignity and integrity of the Band.

Upon receipt of a petition signed by at least 50 percent of the voters calling for the recall of an officer, the Business Committee shall examine the petition and if properly signed by a sufficient number of voters, the Council shall hold a recall election within sixty (60) days after receipt of petition.)

Before any vote for removal is taken the accused official shall be given a written statement of all charges filed against him at least ten (10) days before a meeting of the General Council at which he is to appear and he shall be given a fair opportunity to answer any and all written charges at such meeting. A majority of those voting in such recall election shall govern, provided at least 50 percent of the eligible voters shall participate in such election.

The General Council shall immediately elect a replacement to fill the unexpired term of any tribal official who has resigned, died, or been removed from office.

#### ARTICLE VI. POWERS OF THE GENERAL COUNCIL AND BUSINESS COMMITTEE

A. The General Council shall have the powers and responsibilities hereinafter provided, subject to any limitation imposed by the statutes or the Constitution of the United States:

- (1) To manage, lease, contract or otherwise deal with tribal assets.

- (2) To employ legal counsel, the choice of counsel and filing of fees to be subject to the approval of the Secretary of the Interior or his duly authorized representative.
  
- (3) To enact ordinances, consistent with these Articles of Association, governing future membership, loss of membership and adoption of members into the Band.
  
- (4) To assess fees for the payment of expenses of the Band or to finance any project which in its opinion is for the benefit of the Band as a whole.
  
- (5) To establish its own rules of procedure for the conduct of its affairs and by appropriate ordinance or resolution delegate to the Business Committee or any other committee any of the foregoing powers and duties.
  
- (6) To take such actions as are necessary to carry into effect any of the foregoing powers.
  
- (7) To join in the chartering of or to charter housing authorities.<sup>2</sup>

---

<sup>2</sup> Added April 1, 1973.

(8) To charter corporations and associations.<sup>3</sup>

B. Any rights and powers heretofore vested in the General Council but not expressly referred to in this article, shall not be lost by reason of their omission but may be exercised through the adoption of appropriate by-laws or amendments.

C. Business Committee. The Business Committee shall have the following administrative powers and duties, (but shall not commit the Band to any contract, lease, or other arrangement unless it is so empowered by a duly enacted ordinance or resolution of the General Council:)

(1) Take such actions as are necessary to carry into effect the ordinances, resolutions or other directives of the General Council.

(2) Represent the Band in all negotiations between the Band and local, State and Federal Governments, their agencies and officers.

(3) Faithfully advise the General Council of all actions taken and of the results thereof under authority of C.(1) and C.(2) above.

---

<sup>3</sup> Added April 1, 1973.

### ARTICLE VII. MEETINGS

The General Council shall be convened in a regular meeting on the second Tuesday of every month. Special General Council meetings may be called by the Business Committee or by petition signed by at least twenty percent (20%) of the voters. A meeting of the General Council shall not be valid unless there shall be at least twenty percent (20 %) of the qualified voters present and no business shall be conducted in the absence of a quorum. Members will be notified at least seven (7) days in advance of all special general council meetings. Non-resident members will be notified by mail, those on the reservation by mail, telephone or visit.

The business committee shall meet once a month on dates to be specified by it. Special meetings shall be convened on call of the chairman or majority of the business committee members. A quorum shall consist of three (3) members and no business shall be conducted in the absence of a quorum.

### ARTICLE VIII. DUTIES OF OFFICERS

A. Chairman. He shall preside at all meetings of the General Council and Business Committee. He shall execute on behalf of the Band all contracts, leases or other documents approved by the General Council. He shall certify the adoption of all ordinances or resolutions of both the Business Committee and the General Council. He shall have general supervision of all other officers, employees, and committees of the Band and see that their duties are properly performed. When neither the General Council nor the Business

Committee is in session, he shall be the official representative of the Band. The Chairman shall vote only in the case of a tie vote in either the General Council or Business Committee meetings.

B. Vice-Chairman. In the absence of the Chairman, he shall have the authority and duties of the Chairman, and shall (if requested by the Chairman, assist the Chairman in the performance of his duties.

C. Secretary-Treasurer. He shall keep the minutes of both the General Council meetings and meetings of the Business Committee. He shall attend to the giving of all notices required by this document. He shall also receive on behalf of the Business Committee all petitions provided for in this document. He shall be bonded at the expense of the Band and shall have care and custody of all valuables for the Band and deposit all money in an approved depository. The amount of the bond and the place of depository shall be decided by the General Council. He shall disburse all funds as ordered by the General Council, or Business Committee. He shall maintain financial accounts, receipts and records which shall be available for inspection by members of the General Council, Business Committee, and representatives of the Bureau of Indian Affairs. The Treasurer's record shall be inspected periodically by the Chairman, and they shall be subject to audit at the direction of the General Council or the Bureau of Indian Affairs. The Treasurer shall make a verbal report of receipts, expenditures and bank balance at each regular meeting of the General Council and shall prepare a written financial statement every six months which shall be

presented to the General Council by the Chairman and retained with the records of the Business Committee. Copies of all minutes, resolutions or other enactments shall be submitted to the Bureau of Indian Affairs through the Riverside Area Field Office as soon after their approval as possible.

#### ARTICLE IX. APPROVAL

These Articles of Association shall be in effect after they receive the approval of the Commissioner of Indian Affairs, and the first election of a Business Committee shall take place as provided in Article IV.

#### ARTICLE X. AMENDMENT

These Articles of Association may be amended by a majority vote of the General Council and such amendment shall be in effect upon the approval of the Commissioner of Indian Affairs.



CERTIFICATION

We, the undersigned, duly elected officials of the San Manuel Business Committee, do hereby certify that the foregoing Articles of Association were adopted by the members of the San Manuel Band at a duly called general meeting on June 18, 1966, by a vote of 13 "for" and 1 "against."

/s/ \_\_\_\_\_  
Jane Duro,  
Spokesman

/s/ \_\_\_\_\_  
Sandra C. Marquez,  
Asst. Spokesman

/s/ \_\_\_\_\_  
Linda C. Paramo,  
Secretary

/s/ \_\_\_\_\_  
Erma Jimenez,  
Treasurer

/s/ \_\_\_\_\_  
Julia M. Williams  
Member

/s/ \_\_\_\_\_  
Frances Morongo,  
Member

/s/ \_\_\_\_\_  
Rowena C. Ramos, Member

RECOMMENDED FOR APPROVAL:

/s/ \_\_\_\_\_  
Leonard M. Hill, Area Director; October 31, 1966.

**EXHIBIT B**

## CHAPTER 6. THE SAN MANUEL GAMING ACT OF 1989.<sup>1</sup>

### SMTC 6.1 Title.

This Chapter shall be known as the "SAN MANUEL GAMING ACT OF 1989."

### SMTC 6.2 Findings and Policy.

This Ordinance is adopted by the General Council of the Tribe, a federally recognized Indian Tribe, pursuant to its authority under the Tribal Constitution; for the purpose of establishing the terms for gaming on Tribal Lands for Tribal governmental and charitable purposes, and to continue to develop and operate such gaming consistent with the findings herein and in conformity with the federal Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701 *et seq.*, and regulations promulgated thereunder. The Tribe has been engaged in controlled gaming on its reservation for Tribal governmental and charitable purposes for over three years prior to the enactment of this Act. Based on its experience and observations in connection with such gaming and its studies of similar experiences by other Indian tribes, the Tribe finds that Tribally controlled gaming on its reservation is a valuable means of promoting Tribal economic development, self-sufficiency, employment, job training and strong Tribal government. The Tribe further finds that when regulated by the Tribe, such gaming can remain free from organized crime and other corrupting influences and can be conducted fairly and honestly by both the operators and the players.

The General Council finds that:

6.2.1 Revenues from gaming activities are needed for economic development, to promote Tribal self-sufficiency and a strong Tribal government, and to fund and ensure essential social programs and services;

6.2.2 The Tribe desires to conduct certain forms of gaming to provide needed revenues to the Tribe and to regulate and control such gaming in a manner that will protect the environment; the reservation; the health, security and general welfare of the Tribe; the players; and the community; and

6.2.3 The Tribe desires to manage and regulate such gaming as authorized under this Ordinance in a manner that will adequately address the special interests and needs of the Tribe.

---

<sup>1</sup> Adopted by the General Council on August 31, 1989 as Ordinance 89.02. Amended September 19, 1994, May 13, 1997, September 14, 1999, and November 9, 1999.

**SMTC 6.3 Definitions.**

6.3.1 Unless specified otherwise, terms used herein shall have the same meaning as in IGRA and any regulations promulgated thereunder, including but not limited to references to "Class I," "Class II," and "Class III" gaming.

6.3.2 "Applicable Law" shall mean the IGRA and regulations promulgated thereunder, any Compact between the Tribe and the State, and all other applicable laws and regulations under State, Federal, and Tribal law, including ordinances and regulations.

6.3.3 "Closely Associated Independent Contractors" shall mean any contractor that shares common ownership, officers or directors with any management principal or person related thereto.

6.3.4 "Commissioner" shall mean a commissioner of the San Manuel Gaming Commission.

6.3.5 "Gaming" shall mean an activity in which a person stakes or risks something of value on the outcome of a contest of chance or a future contingent event, not under his or her control or influence, upon an agreement or understanding that the person, or someone else, will receive something of value in the event of a certain outcome, but shall not include bona fide business transactions.

6.3.6 "Gaming Activities" shall mean any Class I, Class II, or Class III gaming conducted by or under the jurisdiction of the Tribe.

6.3.7 "Gaming Commission" shall mean the gaming commission established by the Tribe to monitor gaming activities, investigate wrongdoing, conduct background investigations and issue licenses, and perform other duties as required for the regulation of gaming on the Reservation. For the purpose of conducting background investigations of and issuing licenses to the Commissioners and Gaming Commission staff, such persons shall be deemed to be key employees under this ordinance and shall be required to hold a valid license consistent therewith.

6.3.8 "Gaming Contractor" shall mean any Person or entity supplying materials, supplies, equipment, food, beverages, or services to the Gaming Enterprise.

6.3.9 "Gaming-Related Contract" shall mean any agreement under which materials, supplies, equipment, food, beverages or services are to be supplied to the Gaming Enterprise.

6.3.10 "Gaming Enterprise" shall mean any gaming business, event, enterprise or activity conducted by or under the jurisdiction of the Tribe.

6.3.11 "General Council" shall mean the governing body of the Tribe.

6.3.12 "Key Employee" shall mean a person who performs one or more of the following functions: bingo caller, counting room supervisor, chief of security, custodian of gaming supplies or cash, floor manager, pit boss, dealer, croupier, approver of credit, or custodian of gaming devices including those persons with access to cash and accounting records within such devices. If not otherwise included, any other person whose total cash compensation is in excess of \$50,000 per year, and the four most highly compensated persons in the gaming enterprise are included in the definition of Key Employees. At the discretion of the Gaming Commission, other positions or Persons may be included under the definition of Key Employee and shall be subject to the requirements thereof.

6.3.13 "National Indian Gaming Commission" ("NIGC") shall mean the federal gaming commission established under IGRA.

6.3.14 "Ordinance" or "Act" shall mean the San Manuel Gaming Act of 1989.

6.3.15 "Person" shall mean any natural person or entity, including but not limited to corporations, partnerships and trusts.

6.3.16 "Primary Management Official" shall mean the person who has management responsibility for a management contract; any person who has authority to hire and fire employees or to set up working policy for the gaming enterprise; or the chief financial officer or other person who has financial management responsibility. At the discretion of the Gaming Commission, other positions or Persons may be included under the definition of Primary Management Official and shall be subject to the requirements thereof.

6.3.17 "Related to" shall refer to persons who are related as a father, mother, sister or brother.

6.3.18 "Reservation" shall mean all lands under the jurisdiction and control of the Tribe.

6.3.19 "State" shall mean the State of California.

6.3.20 "Tribal Court" shall mean any court established by the Tribe to hear disputes, or if there is none, the General Council.

#### **SMTC 6.4 Gaming Commission.**

6.4.1 The Tribe hereby establishes the San Manuel Gaming Commission to be composed of no more than three commissioners, at least one of which shall be a member of the San Manuel General Council. One commissioner or, in the alternative, a member of the San Manuel Gaming Commission staff, shall be designated as Secretary/Treasurer to the Commission. All commissioners shall be appointed and removed by the General Council. At least one Commission positions shall be considered a full-time position. The person designated

by the General Council to be Chairman shall be a full-time commissioner. Other commissioners may be part-time and either paid as such or may be reimbursed a set amount for each day actually served. Commissioners shall serve for three (3) year terms, which shall be determined from the date of appointment, and may serve for more than one term if re-appointed, and shall serve past the expiration of any term until replaced or removed. A Commissioner may not be an elected official of the Tribe, employed in any Gaming Enterprise or by the Tribe in any other capacity while serving as a Gaming Commissioner. Gaming commissioners and Commission staff shall be precluded from consulting or employment in any position with the Tribe's gaming activities, including bingo or casino gaming, for a period of no less than two (2) years from their date of termination at the Commission.

6.4.2 Background investigations of Gaming Commissioners and Gaming Commission staff shall be conducted by an independent investigator under the direction of the Tribe's attorney. The attorney shall keep the details of the investigation confidential, but the attorney may confer with the investigator or any other person experienced in conducting or evaluating background investigations provided such other person agrees to maintain the confidentiality of the information obtained about the applicant. The attorney shall make a determination as to whether this Ordinance's requirements for suitability have been met, and if so shall certify that finding in writing to the General Council. In the event the attorney determines there is any reason to believe the applicant may not meet the suitability standards under this Ordinance, the attorney shall so inform the applicant of that determination on a confidential basis. The applicant shall have three (3) business days in which to respond, by providing additional information or other reasons why the applicant should be deemed suitable. If the attorney still believes the applicant is unsuitable, the attorney shall so notify the applicant in writing, who shall have three (3) business days in which to either withdraw from the Gaming Commission (in which case the file shall be sealed) or request that the application be reviewed by the Business Committee of the Tribe. In the event of such review, only those items which the attorney believed rendered the applicant unsuitable shall be revealed to the Business Committee by the attorney. The applicant can request any additional information obtained by the attorney to be submitted to the Business Committee, and may provide such further information as the Business Committee shall permit. Within ten (10) days after closing its own review and investigation of such applicant, the Business Committee shall render a final decision as to the applicant's suitability. In the event of such a finding, the Gaming Commission shall issue a Class A license to the applicant. Appeals from the Business Committee decision shall follow the same procedures as appeals from other license denials.

6.4.3 Commissioners may only be removed from office before the expiration of their terms by the General Council, for neglect of duty, malfeasance or other good cause shown. Good cause shall include repeated (at least three or more) failures to attend required Gaming Commission meetings.

6.4.4 Two (2) members of the Gaming Commission shall constitute a quorum for the purpose of conducting Commission business, provided that nothing herein shall preclude the

Chairman of the commission from conducting Commission business if notice of the meeting has been provided in a timely manner reasonably calculated to provide proper notice to all commissioners, and no commissioner has objected to the meeting. If any commissioner has a conflict of interest in investigating, hearing or deciding a matter to come before the Gaming Commission, such as matters involving a member of the commissioner's household or immediate family (parent, sibling, child, or spouse), that commissioner shall recuse himself or herself for that matter. When only the commissioner with a possible conflict is available to sit on the matter before the Commission, that commissioner shall recuse himself or herself and request the Tribe's Business Committee to serve as the Gaming Commission only for the purposes of that matter; with the exception of licensing matters, in which case the investigation shall be conducted under the direction of the Tribe's attorney through the process established in 6.4.2 of this Gaming Ordinance. All such matters shall be handled fairly and impartially.

6.4.5 The Chairman shall preside over meetings of the Gaming Commission. The Secretary/Treasurer shall be responsible for the receipt and disbursement of Gaming Commission funds in accordance with Tribal governmental agency policies and the Commission budget. Checks drawn on Gaming Commission accounts shall be signed by the Chairman and the Secretary/Treasurer. The Secretary/Treasurer shall ensure that minutes of all Gaming Commission meetings and all official actions taken by the Gaming Commission are taken and transcribed within five (5) days after such meeting or action, and that the written records thereof are maintained for safekeeping.

6.4.6 All actions of the Gaming Commission shall be taken by majority vote of commissioners present. The Commission Chairman may vote on any issue.

6.4.7 Subject to a Budget to be approved on an annual basis by the General Council, commissioners shall be reimbursed for time and expenses incurred in connection with the performance of their duties as Commissioners and in accordance with the budget. Any commissioner employed on a full-time basis shall agree to be employed in accordance and consistent with policies set for other Tribal government employees, and shall be eligible for the same fringe benefits as such other full-time Tribal government employees, and to strictly abide by Commission oaths of confidentiality and professionalism in the discharge of their duties. The salaries for Commissioners shall be approved as part of the annual Budget to be approved by the General Council. Policies with respect to reimbursement of expenses shall be the same as those applicable to other Tribal government employees.

6.4.8 Meetings of the Gaming Commission shall be held at least every other month in conjunction with, and at the location of, the Tribal Business Committee meeting ("Scheduled Meetings"). Any Tribal member may attend Scheduled Meetings. Scheduled Meetings may be changed at any time by the Gaming Commission, with notice of such change posted prominently at least five (5) business days in advance at the Office of the Gaming Commission. Additional meetings shall be held as called by the Chairman or by at least two (2) Gaming Commissioners. Notice of such additional meetings shall be given in writing to each Gaming Commissioner,

served by first class mail or personal delivery at least five (5) business days prior to such meeting. Meetings may be called at any time, by any means, with unanimous consent of the Gaming Commissioners. All Commission discussions, deliberations, and votes taken regarding specific license applications and related background investigations, or any other investigations, and any other matter the Commission deems must be kept confidential in order to preserve the integrity of the Gaming Enterprise or Tribe or to protect the privacy of the applicant, shall be held in executive session.

6.4.9 The Commission shall be deemed to be an agency of the Tribal government and as such shall be subject to the personnel and other governmental administrative policies of the Tribal government as the General Council shall determine from time to time. In the absence of specific personnel policies, those affecting management level employees of the Gaming Enterprise shall be applied to the operation of the Commission. Any exceptions to such policies must be approved by the Tribe's Business Committee. The Commission shall be funded through an annual appropriation by the General Council and such additional funding actions as the General Council shall deem necessary. The Commission shall prepare and propose a budget sixty (60) days before the end of each Tribal fiscal year after meeting and conferring with the Business Committee regarding such budget, which shall be submitted to the General Council promptly thereafter for approval or modification. Within five (5) days after approval of the budget, funds from the Tribe's treasury shall be appropriated and transferred to the Commission's bank account, except that at any time the General Council may prescribe other schedules for disbursing such funds. The Commission shall maintain its accounts, books and records, including records of all income and expenditures, in accordance with generally accepted accounting principles and consistent with Tribal governmental policies regarding management of funds and records. A financial report shall be rendered by the Commission to the General Council at least quarterly. All expenditures shall stay within ten percent (10%) of the approved budget.

6.4.10 Notwithstanding the fact that the Commission is a Tribal governmental agency and is accountable to the Business Committee, on behalf of the General Council, for its administration, the decisions of the Commission regarding licensing, suitability and compliance with Applicable Law shall be within the exclusive province of the Commission, except that the Business Committee may review any allegation that the Commission has exceeded its authority under this Ordinance and if it deems the allegation to be true, shall refer the allegation to the General Council for action, which may include removal of a Commissioner for cause.

6.4.11 All Commissioners shall abide by the following standard of professional conduct: confidentiality, impartiality, fairness, and commitment to upholding the reputation of the Tribe for gaming of the highest integrity and honesty.



**SMTC 6.5 Powers and Duties.**

The Gaming Commission shall have the power and duty to:

6.5.1 Inspect, examine and monitor gaming activities, including the power to demand access to and inspect, examine, photocopy and audit all papers, books and records respecting such gaming activities;

6.5.2 Investigate any suspicion of wrongdoing in connection with any gaming activity;

6.5.3 Conduct or cause to be conducted such investigations as may be necessary to determine in connection with any gaming activity, compliance with law or this Act or any contracts, agreements, goods, services, events, incidents, or other matters related to gaming activities;

6.5.4 Conduct background investigations regarding any person or entity in any way connected with any gaming activity and issue licenses to, at minimum, all Key Employees and Primary Management Officials under requirements at least as stringent as those established in 25 C.F.R. Parts 556 and 558; provided no Commissioner shall provide any personal endorsement, recommendation or other support for an applicant;

6.5.5 Hold such hearings, sit and act at such times and places, summon persons to attend and testify at such hearings, take such testimony, and receive such evidence as the Gaming Commission deems relevant in fulfilling its duties; provided no Commissioner shall provide any personal endorsement, recommendation or other support for an applicant;

6.5.6 Administer oaths or affirmations to witnesses appearing before the Gaming Commission;

6.5.7 Establish procedures and implement and administer the system for investigating, licensing and monitoring employees, businesses, and others connected with gaming activities, as described in Section 6 below, including the issuance of licenses to gaming facilities, individuals and entities as required under this Act and IGRA;

6.5.8 Carry out such other duties with respect to the regulation of gaming activities on the Reservation as the General Council shall direct;

6.5.9 Issue any regulations it deems appropriate to implement the provisions of this Act;

6.5.10 Hear disputes against the gaming establishment, in accordance with procedures established in this Act;

6.5.11 Hire such staff and obtain support services as deemed necessary, subject to a budget approved by the General Council;

6.5.12 Promulgate rules for each Class I game recognized hereunder, and of any Class II or Class III games permitted hereunder, to govern the conduct of such games;

6.5.13 On or before April 30th of each year, provide to the General Council an Annual Report summarizing the Gaming Commission's activities during the prior twelve month period ending on December 31st, and accounting for all receipts and disbursements; and

6.5.14 To the extent required, comply with any reporting requirements established under a tribal-state compact to which the Tribe is a party and other applicable law, including IGRA.

#### **SMTC 6.6 Enforcement**

In the event any Commissioner determines that a licensee of the Gaming Enterprise has violated Applicable Law, including any internal control procedures or policy of the Gaming Enterprise, a written report of such incident shall immediately be made to the Commission. The Commission shall then determine, by majority vote, what action should be taken, if any. If action is required, the Commission shall issue a citation to the Gaming Enterprise, notifying it of the specific violation(s) or issues, measures which must be taken for correction, and a reasonable time limit in view of all the circumstances in which such action must be taken. Copies of any such citation shall simultaneously be served on the Business Committee of the Tribe. The Commission may enforce such citations by: (a) suspending or revoking the licenses of any persons found to have violated Applicable Law; or (b) such lesser penalty or other remedy as the Commission shall determine, including the imposition of fines not to exceed \$100 per offense. Nothing herein shall prevent or prohibit the Gaming Commission from seeking compliance assistance from law enforcement agencies, the Bureau of Indian Affairs, or the National Indian Gaming Commission, particularly but not limited to any instance in which the Gaming Enterprise and the General Council have failed to correct a violation of Applicable Law.

#### **SMTC 6.7 Permitted Gaming Activities; Use of Funds; Regulation of Gaming Activities.**

6.7.1 All gaming activities on the reservation (whether Class I, II or III) are prohibited except as expressly permitted under this Act.

6.7.2 Class I gaming activities are hereby permitted to the extent consistent with Tribal custom and practice and provided the General Council is given at least seven (7) days prior notice in writing of any intention to engage in such gaming. The General Council may prohibit any conduct which is claimed to be Class I gaming if the Council finds that such conduct is not in accordance with Tribal customs or practices or violates IGRA or any other law.

6.7.3 Class II and Class III gaming on the Reservation is hereby authorized, provided that such gaming is controlled and operated by the Tribe, which shall have the sole proprietary interest in and responsibility for the conduct of such Gaming Enterprise, or has, to the extent permitted, contracted with and licensed a person or entity to own, operate or manage the Gaming Enterprise pursuant to the provisions of IGRA or as otherwise authorized by law. Nothing herein shall prohibit the Tribe from engaging the services of non-Tribal persons as employees thereof or engaging any person or entity to assist the Tribe in the management of a Gaming Activity pursuant to a management agreement entered into under the provisions of IGRA or any other applicable law. Class III gaming shall be conducted in accordance with any Tribal-State compact between the Tribe and the State of California, or any alternative thereto as provided by IGRA.

6.7.4 Except as provided for under the terms of an agreement pursuant to the provisions of IGRA or as otherwise permitted by law, all revenues generated from any Class II or Class III gaming activity are the property of the Tribe. Any profits or net revenues from gaming activities (other than those which may constitute a fee to any consultant or manager) shall be deposited into the general treasury of the Tribe and shall only be used:

- A. to fund Tribal programs or operations;
- B. to provide for the general welfare of the Tribe and its members;
- C. to promote Tribal economic development;
- D. to donate to charitable purposes; or
- E. to help fund operations of local governmental agencies.

6.7.5 Except for rights to per capita payments, if any, or as set forth below, no Tribal member shall have any interest or expectation in any funds generated by any gaming activity. All such funds are deemed Tribal funds only and are and shall remain the property of the Tribe until disbursed, if at all, from the general treasury. The General Council shall retain the sole discretion as to how such funds are utilized, and once becoming part of the treasury such funds shall lose any identity as gaming revenues except to the extent necessary to identify them as such for accounting purposes or to comply with applicable law. Notwithstanding anything herein to the contrary, if the Tribe elects at any time to make per capita payments to the members, it shall authorize such payments only upon approval of a plan submitted to the Secretary of the Interior under 25 U.S.C. § 2710(b)(3). Payments out of general treasury funds to tribal members under other tribal programs, including those relating to health, welfare, education, elderly care, and housing, shall not be deemed to be "per capita" payments when such funds are paid from the tribe's general treasury.

### SMTC 6.8 Operation of Gaming Establishments.

6.8.1 Tribal License. Except to the extent authorized by an agreement pursuant to the provisions of IGRA or as otherwise permitted by law, Gaming Activities shall only be conducted in Tribally owned, operated and licensed facilities. Such activities shall be conducted pursuant to the terms and conditions of a license to be issued by the Tribe for such purposes as to each facility before any gaming activities may occur therein. Such licenses shall specify the hours of operation, type and scope of gaming activities allowed therein, permitted uses of the facility for other activities, applicable rules of conduct, regulation of alcoholic beverages, food handling and entertainment, and such other matters as the Gaming Commission may deem necessary to the conduct of gaming activities therein.

6.8.2 Protection of Environment and Public Health and Safety. Any construction or maintenance of any gaming facility, and the operation of gaming therein, shall be conducted in a manner which adequately protects the environment and the public health and safety.

6.8.3 Ownership of Gaming. The Tribe shall have the sole proprietary interest in and responsibility for the conduct of any gaming operation authorized by this gaming Ordinance, except to the extent the Tribe may contract with and license a person or entity to own, operate, or manage the enterprise pursuant to the provisions of IGRA or as otherwise permitted by law.

6.8.4 Dispute Resolution. Patrons who have complaints against the gaming establishment shall have as their sole remedy the right to file a petition for relief with the Gaming Commission. For such purposes, disputes of patrons with any management contractor or its employees shall be made to the Gaming Commission, and such shall be the exclusive remedy for patron complaints. Complaints shall be submitted in writing and, at the discretion of the Gaming Commission, the petitioner may be allowed to present evidence. The Gaming Commission will render a decision in a timely fashion and all such decisions will be final when issued. Any patron having a claim against the gaming establishment or a management contractor or its employees must submit such claim to the Gaming Commission within thirty (30) days of its occurrence. All claims by patrons shall be limited to a maximum recovery of \$10,000 per occurrence and a cumulative limit of \$20,000 per patron in any twelve (12) month period.

### SMTC 6.9 Audits.

6.9.1 The Tribe shall cause to be conducted annually, by a recognized independent accounting firm, an audit of all gaming operations. The results of the audit shall be submitted to the General Council and, to the extent required by law, to the Bureau of Indian Affairs and the National Indian Gaming Commission.

6.9.2 All Gaming-Related Contracts for an amount in excess of \$25,000 annually (except contracts for professional legal or accounting services) relating to the Gaming Enterprise shall be subject to such independent audits. At least three (3) bids shall be required before any contract

for goods or services in connection with any gaming activity for an amount in excess of \$5,000 or to be performed over a period of more than twenty (20) days may be executed. The General Council may waive the requirement of three (3) bids upon good cause shown. All proposals for bids as well as all bids received shall be reviewed at the discretion of the Gaming Commission. The Gaming Commission shall receive a copy of all Gaming-Related Contracts for an amount in excess of \$5,000 for filing and possible review. Any contract which is the subject of this Section must be approved by the General Council before becoming effective. To the extent possible, the Tribe will approve the lowest responsive and qualified bid.

#### SMTC 6.10 Licenses.

6.10.1 It is the declared policy of the Tribe that all gaming activities be licensed and controlled so as to protect the morals, good order and welfare of Tribal members and other persons on the reservation and to preserve the honesty, fairness and integrity of such gaming activities. Accordingly, no person shall engage in any gaming activity on the reservation without an appropriate and valid license issued by the Gaming Commission for such gaming activity, except as provided in the Act or the regulations issued by the Gaming Commission. Any gaming license which is issued, or finding of suitability or approval by the Gaming Commission, shall be deemed a privilege subject to suspension or revocation. No License shall be issued that would place the Tribe in violation of IGRA of any Tribal-State Compact to which the Tribe is a party, or of any applicable law.

6.10.2 The burden of proving an applicant's qualification to receive any license hereunder is at all times on the applicant. Applicants must accept any risk of adverse public notice, embarrassment or other action which may result from the application process and expressly waive any claim for damages as a result thereof.

6.10.3 An applicant may claim any privilege afforded by law in connection with a gaming license application or investigation, but a claim of privilege with respect to any testimony or evidence pertaining thereto may constitute sufficient grounds for denial, suspension or revocation.

6.10.4 Two classes of licenses shall be issued to Persons associated with gaming activities, and a work permit shall be issued to minors employed in non-gaming activities:

A. Class A Licenses. Before permitting any Person to become associated with any gaming activity as an investor or other Person owning or controlling 10% or more of any interest in any management entity, or any Primary Management Official, Key Employee, or Closely Associated Independent Contractor, or at the discretion of the Gaming Commission, any Gaming Contractor, or other Persons or positions the Gaming Commission may designate, shall obtain a Class A license. The Gaming

Commission shall conduct a background investigation to determine if such Person has:

1. Any criminal record or any reputation, prior activities, habits or associations which might pose a threat to the public interest or to the effective regulation of gaming;
2. Anything else in their background which might create or enhance the dangers of unsuitable, unfair, or illegal practices and methods and activities in the conduct of gaming.

B. Class B Licenses. Persons who are not among those identified in subsection A but are to be employed in Gaming Activities or non-gaming employment in the gaming facility, or are otherwise associated with or doing business with the Gaming Enterprise, shall be required to obtain a Class B license from the Gaming Commission. Such Persons must establish that they have not been convicted of a crime, or engaged in any activity, which the Gaming Commission in its sole discretion deems to render such Person a danger to the safety or integrity of the Gaming Activities or the safety or property of the Tribe, any Tribal member, any gaming employee or patron, or the public.

C. Class C Work Permits. Minors employed in non-gaming activities at the Reservation may be issued a Class C work permit, provided such minors are not deemed by the Gaming Commission to pose any threat to the safety or integrity of Gaming Activities or the safety or property of the Tribe, any Tribal member, any gaming employee or patron, or the public, and such work permits shall be valid for no more than two (2) years. Minors shall not be employed as dealers or otherwise to operate or supervise the Gaming Activities, or to serve liquor.

6.10.5 All Class A and Class B licenses, as well as Class C work permits, shall be subject to renewal at least every two (2) years, and may be revoked or suspended upon the occurrence of any act which, if known during the application process, would have tended to disqualify such Person for such a license or permit.

6.10.6 Pending completion of an investigation for a Class A or Class B license, temporary licenses of no more than ninety (90) days duration may be issued by the Gaming Commission if in its sole discretion it deems it appropriate to do so. Notwithstanding anything in this Act to the contrary, prior to obtaining a temporary license, natural persons may be hired to perform Class A or Class B duties for no more than three (3) days in any one (1) year period.

6.10.7 The Gaming Commission may employ all reasonable means, including the engagement of outside services and investigators and the holding of hearings, to acquire the information necessary to determine whether or not a license should issue. Unless specifically waived by the Gaming Commission, each applicant for a Class A or B license, as well as for Class C work permits, shall be required to pay the established license fee and reimburse the Gaming Commission for all costs incurred in obtaining background information for processing such application. Unless otherwise waived by the Gaming Commission, all fees and costs must be received by the Gaming Commission prior to issuance of the license. Estimates of such costs will be provided to an applicant upon request.

6.10.8 All Persons applying for a license or work permit shall agree to release all information necessary in order for the Gaming Commission to achieve its goals under this Section and to furnish such information to the Bureau of Indian Affairs, the NIGC or such other governmental agency as may be required by law.

6.10.9 Any Person engaged by or associated with any Gaming Activities on the Reservation shall conduct themselves with honesty, integrity, and with such decorum and manners as may be necessary to reflect positively on the Tribe, its members and the Gaming Activities involved. Any failure to abide by such standards, or any violation of any rule, ordinance, custom or tradition of the Tribe, the Reservation or the Gaming Activity, or the terms or conditions of the license, may be grounds for immediate suspension or revocation of any license issued hereunder.

6.10.10 Background Investigations.

A. The Gaming Commission shall request from, at minimum, each applicant for a Key Employee or Primary Management Official license all of the information specified in subsections (1) through (14) below. The Gaming Commission may, at any time, request additional information either prior to, during, or subsequent to any background investigation for any license applicant.

(1) Full name, other names used (oral or written), social security number(s), date of birth, place of birth, citizenship, gender, all languages (spoken or written);

(2) Currently and for at least the previous five (5) years; business and employment positions held, ownership interest in those business, business and residence addresses and drivers license number(s);

(3) Names and current addresses of at least three (3) personal references, including one personal reference who was acquainted with the applicant during each period of residence as listed above under subsection (2);

- (4) Current business and residence telephone numbers;
- (5) Description of any existing and previous business relationships with the Indian tribes, including ownership interest in those businesses;
- (6) A description of any existing and previous business relationships with the gaming industry generally, including ownership interests in those businesses;
- (7) Name and address of any licensing or regulatory agency with which the person has ever filed an application for a license or permit related to gaming, whether or not such license or permit was granted;
- (8) For each felony for which there is an on-going prosecution or a conviction: the charge, the name and address of the court involved, and the date and disposition, if any, of the case;
- (9) For each misdemeanor conviction or on-going misdemeanor prosecution (excluding minor traffic violations), whether or not such information is still listed on the applicant's records, within ten (10) years of the date of the application; the name and address of the court involved, and the date and disposition, if any, of the case;
- (10) For each criminal charge (excluding minor traffic charges), whether or not there is or was a conviction and whether or not such information is still listed on the applicant's records, if such criminal charge is within ten (10) years of the date of the application and is not otherwise listed above pursuant to subsections (8) or (9): the criminal charge, the name and address of the court involved and the date and disposition, if any, of the case;
- (11) Name and address of any licensing or regulatory agency (Federal, Tribal, State, local or foreign) with which the person has filed an application for an occupational license or permit, whether or not such license or permit was granted;
- (12) Current photograph;
- (13) Any other information the Tribe deems relevant; and
- (14) Fingerprints consistent with procedures adopted by the Tribe according to 25 C.F.R. § 522.2(h).



B. The Gaming Commission shall conduct or cause to be conducted an investigation sufficient to make a determination of eligibility as required under this Ordinance. In conducting the background investigation, the Gaming Commission or its agents shall promise to keep confidential the identity of each person interviewed in the course of the investigation, except to the extent such information must be disclosed in a hearing conducted under this Ordinance on the licensee's suitability and qualifications for a license. The Gaming Commission may establish guidelines and procedures for disclosure of licensing information, as appropriate.

6.10.11 Eligibility Determination.

The Gaming Commission shall review a Person's prior activities, criminal record, if any, and reputation, habits and associations to make a finding concerning the eligibility of a Key Employee or Primary Management Official for employment in a gaming operation. If the Gaming Commission determines that employment of the Person poses a threat to the public interest or to the effective regulation of gaming, or creates or enhances dangers of unsuitable, unfair, or illegal practices and methods and activities in the conduct of gaming, the gaming enterprise shall not employ that Person except as specifically established by the Gaming Commission.

6.10.12 Forwarding Licensing Applications and Reports to the NIGC.

6.10.12.1 On or before the date any Key Employee or Primary Management Official is employed by a gaming enterprise authorized under this Ordinance, the Gaming Commission shall forward to the NIGC the Person's completed application for employment containing the information required above under Section 6.10.10 A. of this Ordinance.

6.10.12.2 Prior to issuing a license to a Primary Management Official or Key Employee, the Gaming Commission shall forward to the NIGC, together with a copy of the eligibility determination made under Section 6.10.11 above, an investigative report on each background investigation. The investigative report on each background investigation shall be forwarded to the NIGC within sixty (60) days after the employee begins work, or within sixty (60) days of the approval of this Ordinance by the NIGC. In no case shall the gaming enterprise employ or continue to employ any Person as a Key Employee or Primary Management Official who does not have a license within ninety (90) days of beginning work.

The investigative report shall include the following information:

6.10.12.2.1 Steps taken in conducting a background investigation;

- 6.10.12.2.2 Results obtained;
- 6.10.12.2.3. Conclusions reached; and
- 6.10.12.2.4 The bases for those conclusions.

6.10.12.3 The Gaming Commission shall provide to the NIGC or other agency, any other reports and information required by IGRA and regulations promulgated thereunder. Further, with respect to Key Employees and Primary Management Officials, the Gaming Commission shall retain applications for employment and reports (if any) of background investigations for inspection by the NIGC for no less than three (3) years from the date of termination of employment.

6.10.12.4 If a license is not issued to an applicant, the Gaming Commission shall notify the NIGC and may forward copies of its eligibility determination and investigative report (if any) to the NIGC for inclusion in the Indian Gaming Individuals Records System.

#### 6.10.13 Granting a Gaming License.

6.10.13.1 If, within a thirty (30) days period after the NIGC receives a report as required under subsection 6.10.12.2 above, the NIGC notifies the Gaming Commission that it has no objection to the issuance of a license pursuant to the license application filed for a Key Employee or Primary Management Official for whom the Gaming Commission has provided an application and investigative report, the Gaming Commission may issue the license.

6.10.13.2 The Gaming Commission shall provide any additional information requested by the NIGC concerning a Key Employee or Primary Management Official who is the subject of a report as required under subsection 6.10.12.2 above. A NIGC request for additional information shall suspend the thirty (30) day period under subsection 6.10.13.1 above until the NIGC receives the additional information.

6.10.13.3 If, within the thirty (30) day period established under subsection 6.10.13.1 above, the NIGC provides a statement itemizing objections to issuance of a license to a Key Employee or Primary Management Official, the Gaming Commission shall reconsider the application, taking into account such objections. The Gaming Commission retains the right to make the final determination whether to issue the license to such applicant.

#### 6.10.14 Appeals.

All decisions of the Gaming Commission regarding the issuance, denial, suspension or revocation of licenses, or regarding other matters within its jurisdiction, shall be considered final and effective when issued; provided, within fifteen (15) days of receipt of written notice of, or sixty (60) days following issuance of, a decision or order of the Gaming Commission, whichever first occurs, any party who is the subject of such decision or order may file a petition for reconsideration with the Gaming Commission. Upon receipt of a timely filed petition for reconsideration, the Gaming Commission shall within thirty (30) days thereafter either set the matter for hearing or issue an order thereon. No Commissioner shall provide any personal endorsement, recommendation or other support for an applicant in connection with such reconsideration. Any member of the Tribe whose application for a new or renewed license is denied by the Gaming Commission, or whose license is suspended or revoked by the Gaming Commission, may within thirty (30) days of receiving written notice of such action when first taken, or within ten (10) days of receiving written notice of the result of any reconsideration sought by such member, appeal to the General Council, which shall have the power to order that such license be issued or reinstated, provided that no such license shall be issued or reinstated for more than one (1) year, subject to the renewal procedures set forth in this Ordinance. No Commissioner shall provide any personal endorsement, recommendation or other support for an applicant in connection with such appeal. Notwithstanding the foregoing, no license may be issued or reinstated by the Gaming Commission or the General Council if to do so would place the Tribe in violation of any Tribal-State Compact to which the Tribe is a party, or of applicable law.

#### 6.10.15 License Suspension.

6.10.15.1 If, after issuance of a gaming license, the Gaming Commission receives reliable information from the NIGC or other reliable sources indicating that a Key Employee or a Primary Management Official is not eligible for employment under the eligibility criteria established in Section 6.10.10 above, the Gaming Commission shall suspend the license and shall notify the licensee in writing of the license suspension and proposed revocation.

6.10.15.2 The Gaming Commission shall notify the licensee of a time and place for a hearing on the proposed revocation of a license.

6.10.15.3 After the revocation hearing, the Gaming Commission shall determine whether to revoke or to reinstate the gaming license. For actions taken in response to information provided by the NIGC, the Gaming Commission shall notify the NIGC of its decision.

### 6.10.16 Application Forms.

A. Each application form for a Key Employee or Primary Management Official, as well as for all other Class A license applicants, unless otherwise specifically exempted by the Gaming Commission, shall contain the notices set forth in subsections (1) and (2) below:

(1) Privacy Act Notice:

*In compliance with the Privacy Act of 1974, the following information is provided: Solicitation of the information on this form is authorized by 25 U.S.C. § 2701 et seq. The purpose of the requested information is to determine the eligibility of individuals to be employed in a gaming operation. The information will be used by the National Indian Gaming Commission members and staff who have need for the information in the performance of their official duties. The information may be disclosed to appropriate Federal, Tribal, State, local, or foreign law enforcement and regulatory agencies when relevant to civil, criminal or regulatory investigations or prosecutions or when pursuant to a requirement by a Tribe or the National Indian Gaming Commission in connection with the hiring or firing of an employee, the issuance or revocation of a gaming license, or investigations of activities while associated with a Tribe or a gaming operation. Failure to consent to the disclosures indicated in this notice will result in a Tribe's being unable to hire you in a Primary Management Official or Key Employee position.*

*The disclosure of your Social Security Number (SSN) is voluntary. However, failure to supply a SSN may result in errors in processing your application.*

(2) Notice Regarding False Statements.

*A false statement on any part of your application may be grounds for not hiring you, or for firing you after you begin work. Also, you may be punished by fine or imprisonment. (U.S. Code, title 18, § 1001).*

B. Any existing Key Employee or Primary Management Official, or other Class A licensee unless otherwise specifically exempted by the Gaming Commission, shall be notified that they shall either:

(1) Complete a new application form that contains the Privacy Act notice and the notice regarding false statements; or

(2) Sign a statement that contains the Privacy Act notice and consent to the routine uses described in that notice, and sign a statement that contains the notice regarding false statements.

**6.10.17 Immediate Termination of Employment.**

Upon the issuance of any order of the Gaming Commission denying, suspending or revoking a license, and regardless of whether a petition for reconsideration or an appeal is filed, the applicant or licensee shall not be permitted to perform any employment duties requiring such a license until further order of the Gaming Commission, *provided* that nothing herein shall preclude such person from applying for a position at the Gaming Enterprise requiring a Class B license or no Gaming License, *and provided further* that if a Class B license is required it shall be sought on the basis of a new license application.

**SMTC 6.11 Class III Gaming; Tribal-State Compacts.**

In addition to the provisions set forth above, Class III gaming shall be engaged in on the reservation pursuant to a Tribal-State compact or alternative as provided by IGRA. All negotiations for such compacts shall be conducted through the Tribal Chairman, with the advice and suggestion of the Gaming Commission, and shall be finalized only upon majority vote of the General Council after consideration of the terms of such compact.

**SMTC 6.12 Tribal Corporation.**

Nothing in this Ordinance shall prevent the Tribe, through its General Council, from delegating authority to conduct gaming to one or more Tribal corporations, so long as the Tribal Gaming Enterprise to which such authority is delegated agrees to meet all criteria and requirements established under this Ordinance.

**SMTC 6.13 Gaming by Tribal Members; Interest in Management Contracts by Tribal Officials.**

No Tribal member shall engage in or be permitted to engage in either directly or indirectly through another person, any Class II or Class III Gaming Activities authorized hereunder. No elected official of the General Council, Gaming Commission, or any other committee or agency of the Tribe shall have a financial interest in or management responsibility for, any management agreement entered into pursuant to IGRA, nor shall such elected official serve on the board of directors or hold (directly or indirectly) ten percent (10%) or more of the issued and outstanding stock of any corporation having a financial interest in, or management responsibility for, such contract.

**SMTC 6.14 Service of Process.**

The Tribe designates as its agent for the service of any official determination, order, or notice of violation, the Chairperson of the Tribe.

**SMTC 6.15 Repeal of Prior Gaming Ordinances; Effective Date.**

To the extent inconsistent with this Ordinance, all prior gaming ordinances are hereby repealed on the effective date of this Ordinance. After adoption by the Tribe's General Council, this Ordinance becomes effective on the date of final approval by the NIGC.

**EXHIBIT C**

## **CHAPTER 8. SAN MANUEL TRIBAL GAMING REVENUE ALLOCATION ACT<sup>1</sup>**

### **SMTC 8.1 Title**

This Chapter shall be known as the San Manuel Tribal Gaming Revenue Allocation Act.

### **SMTC 8.2 Definitions**

8.2.1 "Tribal Net Revenues" shall mean gross revenues of a Class II or Class III Tribal gaming activity under the Indian Gaming Regulatory Act, less amounts paid out as, or paid for, prizes and total operating expenses.

8.2.2 "Per Capita Payment" shall mean any payment made from Tribal Net Revenues directly to a tribal member (including through an intermediary, such as an escrow account, trust fund, federally administered fund, or the like) pursuant to this Plan.

8.2.3 "Allocations" shall mean those minimum amounts, as set forth herein by percentages, of Tribal Net Revenues allocated by the Tribe to specific purposes.

8.2.4 "Gaming Distributions" shall mean the distributions to the Tribal government of Tribal Net Revenues from the San Manuel Indian Bingo & Casino facilities.

8.2.5 "Gaming Revenues" shall mean Tribal Net Revenues from Tribal gaming activities on the San Manuel Indian Reservation which have been placed into the Tribe's general treasury.

8.2.6 "Tribal Member" shall mean any person recognized by the Tribe as a member, including minors and legally incompetent persons.

8.2.7 "IGRA" shall mean the Indian Gaming Regulatory Act of 1988, 25 U.S.C. § 2701 et seq.

8.2.8 "Monthly Allocation" shall mean the percentage of Tribal Net Revenues allocated to a particular purpose, as set forth in SMTC 6 below.

### **SMTC 8.3 Purpose**

The purpose of this Chapter is to establish a plan for the allocation of Tribal Net Revenues on a monthly basis which will meet the needs, both short-term and long-term, of the Tribe and its Tribal Members, and will comply with the requirements set forth in the Indian Gaming Regulatory Act. The Tribe's objectives include providing for the general welfare of Tribal Members; funding tribal government operations or programs, including but not limited to tribal security, the improvement of tribal administrative and recreational facilities, reservation infrastructure, and the protection and

---

<sup>1</sup>Adopted by the General Council as Ordinance No. 96.01 on March 12, 1996



conservation of tribal lands and their resources; promoting tribal economic development; donating to charitable organizations; and assisting with the funding of local government agencies. The ordinance is intended to be sufficiently flexible that it may be amended by the General Council without Secretarial approval to meet specific needs as they may arise.

**SMTC 8.4 Findings.**

8.4.1 The Tribe's operation of gaming activities pursuant to The San Manuel Gaming Act of 1989, IGRA and the regulations promulgated under the respective Acts is vital to the Tribe's self-sufficiency, economic development and a strong tribal government.

8.4.2 The Tribe recognizes that because of earlier deprivations of its economic base in the San Bernardino area, discrimination, and limited access, if any, to employment opportunities available to others in the area, many of its Tribal Members historically held little if any prospect of having a secure source of income for meeting basic needs if they chose to remain on or closely associated with the reservation. The Tribe further recognizes that such lack of security was detrimental to the welfare of Tribal Members.

8.4.3 The Tribe finds that the Tribe's Health and Welfare Act of 1986 and the Gaming Proceeds Per Capita Distribution Plan of 1992 have been successful, and that welfare grants to eligible Tribal Members are generally no longer warranted, but that the 1986 Act is not repealed by this Chapter.

8.4.4 All Tribal Members have an interest in the manner in which Tribal Net Revenues are expended by the Tribe, and in ensuring that such expenditures are consistent with the objectives of the Tribe and its Tribal Members.

8.4.5 In order to implement these findings, the General Council has determined that Tribal Net Revenues shall be allocated as set forth below.

**SMTC 8.5 Allocation of Gaming Revenue Distribution.** All Tribal Net Revenues are distributed to the Tribal government from the San Manuel Indian Bingo & Casino ("Gaming Distributions"). At the time each Gaming Distribution is received by the Tribal government, the Tribal government shall record on its books and records the respective amounts of the Gaming Distribution necessary to comply with the allocations set forth in this Plan.

**SMTC 8.6 Allocation of Gaming Revenues.** Each Gaming Distribution received by the Tribal government shall be allocated at the time of distribution into separate accounts ("Accounts"). Each of the Accounts shall be dedicated to expenditures in the categories listed herein, pursuant to a budget to be approved by the General Council. All budgets shall set forth a schedule for release of the Accounts, or if no specific date for release can be determined, the events or determinations which must occur as a condition to the release of monies from an Account. The current financial status and a summary of the activities in each Account for the previous accounting period shall be set forth in any Tribal government financial statement, which shall also consolidate all Accounts for reporting purposes. Upon receipt, the following maximum allocations of each Gaming Distribution shall be made to the Accounts indicated:

8.6.1 Tribal governmental operations and programs:

30 %

This category shall include the following subcategories for budgetary purposes:

- a. Administrative functions, including personnel, equipment, taxes, office overhead, and other administrative functions
- b. Tribal security
- c. Tribal education programs
- d. Tribal housing assistance
- e. Assistance to Tribal elderly
- f. Tribal health and medical programs
- g. Tribal fire protection services
- h. Reservation infrastructure improvements

8.6.2 Per capita distributions to Tribal Members (the Per Capita Account") (subject to the limitations on such distributions set forth in SMTCs 8 and 9 below):

45 %;

8.6.3 Tribal economic development:

20 %;

8.6.4 Donations to charitable organizations:

4 %;

8.6.5 Funding operations of local government agencies:

1 %.

**SMTC 8.7** **Qualification Applicable to All Allocations; Balance of Unallocated Gaming Revenues.** The balance of unallocated funds shall be placed in the Tribe's general treasury. Notwithstanding anything else in this Chapter to the contrary, no allocations shall be made to any Account unless sufficient working funds for the Tribal government have been determined to be available.

**SMTC 8.8** **Per Capita Payments.** The General Council shall be authorized to approve the distribution of Per Capita Payments to the extent available in the Per Capita Account. All Per Capita Payments shall be made to all Tribal Members simultaneously, and in equal shares, provided, the General Council may distinguish between adult Tribal Members and minor Tribal Members in allocating the amount of equal monthly distributions, provided all members of an identified group receive an equal amount. The General Council has determined that it is appropriate to distinguish between adult and

minor Tribal Members in allocating the amount of equal monthly distributions because all basic needs of minor Tribal Members are provided for, since adult Tribal Members assume the expense of providing for the health and welfare of the minor Tribal Members and tribal governmental programs provide educational and other benefits to minor Tribal Members. Nothing herein shall prohibit a Tribal Member from requesting a reduction in his or her Per Capita Payment.

**SMTC 8.9** Per Capita Account. Per Capita Payments shall be paid solely from the Per Capita Account. The Per Capita Account and payments from it shall be readily distinguishable from other monies on deposit in the tribal treasury. Tribal Members shall have no interest, vested or contingent, direct or indirect, in the Per Capita Account, in such tribal treasury funds, or in any revenues intended for payment thereto, it being recognized that such funds are the sole property of the tribal government and not of any of its Tribal Members individually until actually received by the Tribal Member.

**SMTC 8.10** Per Capita Trust Funds.

8.10.1 Per Capita Payments due to Tribal Members who are minors, or to persons determined to be legally incompetent, shall be paid into trust funds established for the health, education and welfare of such minors and incompetents.

8.10.2 The Trustee(s) for each such trust fund shall be designated by the Tribal Member for whose minor child or closely related incompetent's benefit said trust is created. Upon request of the Tribal Member, the Trustor shall amend the trust agreement to designate such additional Trustee(s) the Tribal Member may designate (Designated Trustee(s)). Such Designated Trustee(s) may be removed by Tribal Member at any time. A Designated Trustee may be designated by the Tribal Member to act as sole Trustee. All designations and removals shall be honored by Trustor, but Trustor may refuse to do so for good cause shown.

8.10.3 Nothing herein shall preclude parents or spouses of the beneficiaries from being the Trustee(s) of such trust funds, provided such Trustee(s) agree to act in accordance with customary fiduciary principles.

8.10.4 All trust agreements must provide that payment to or for the benefit of the beneficiary may only be disbursed for their health, education or welfare. Trustee(s) shall maintain written explanation of circumstances justifying expenditure of trust funds and shall maintain records to account for all expenditures.

8.10.5 All trust plans must be approved by the Tribe and the Secretary of the Interior.

8.10.6 Any trust hereunder may be terminated and the proceeds distributed to the minor or incompetent, upon the beneficiary's reaching the age of majority or being determined legally competent.

**SMTC 8.11** Removal of Trustee. If it should become necessary to remove a Trustee for cause, the matter shall be submitted to the General Council for a hearing. Any Tribal Member or non-Tribal Member Trustee who is subject to removal for cause under this Chapter shall be notified in writing by the General Council of the grounds for the removal and requested to appear at a General Council meeting no less than 10 days after the date of such notice to show cause why he or she should not be subject to removal. At the hearing the Trustee shall be given an opportunity to be heard and to examine

evidence against him or her, and may present such evidence and argument as shall be reasonably related to the alleged offense. The Tribal Chairperson shall preside over such hearing, which shall be conducted informally. The Chairperson shall have the discretion to permit the presentation of any evidence which in the Chairperson's determination is considered to be reliable. At the conclusion of the presentation of evidence and arguments, the Chairperson shall call for a vote of the General Council, which by majority vote shall determine what good cause, if any, exists, and whether removal is warranted. Determinations by the General Council shall be final.

**SMTC 8.12** Review of Expenditures of Net Gaming Revenues. The General Council shall review each Tribal government financial statement for the purpose of reviewing the expenditures of Tribal Net Revenues to ensure the Tribal Net Revenues are allocated in accordance with the requirements of this Act. In the event the allocations are not in accordance with the requirements set forth in SMTC 6 of this Act, The General Council shall issue instructions directing the redistribution of Tribal Net Revenues in accordance with SMTC 6 of this Act, and shall issue the necessary directives to ensure improper allocations do not reoccur.

**SMTC 8.13** Dispute Resolution. If a dispute arises relative to the interpretation or implementation of this Act, the matter shall be submitted to the General Council for a hearing. Any Tribal Member who has a claim under this Chapter shall notify the General Council in writing of the basis for his or her complaint and shall request to appear at a General Council meeting no less than 10 days after the date of such written notice to present his or her complaint. At the hearing the Tribal Member shall be given an opportunity to be heard and to present such evidence and argument as shall be reasonably related to the alleged claim. The Tribal Chairperson shall preside over such hearing, which shall be conducted informally. The Chairperson shall have the discretion to permit the presentation of any evidence which in the Chairperson's determination is considered to be reliable. At the conclusion of the presentation of evidence and arguments, the Chairperson shall call for a vote of the General Council, which by majority vote shall determine what good cause, if any, exists, and whether the complaint is meritorious. If the General Council shall determine a complaint to be meritorious, the General Council shall have the discretion to determine an appropriate remedy to address the grievance. Determinations by the General Council shall be final.

**SMTC 8.14** Amendment of Prior Ordinance. San Manuel Ordinance 89-02, § 6.7.5 (SMTC 6.1 et seq.) is hereby amended to read as follows:

"Notwithstanding anything in this Chapter to the contrary, revenues generated from a gaming activity on the reservation may be excluded from monies paid to the tribal treasury and may be paid to or for the benefit of Tribal Members as Per Capita Payments provided such Per Capita Payments are made pursuant to an ordinance approved by the Tribe and made effective in accordance with law."

**SMTC 8.15** Federal Tax Notification. Any Per Capita Payment made to or for the benefit of any Tribal Member under this Chapter shall be accompanied by a statement to the recipient Tribal Member that such payments are subject to Federal taxation. All Per Capita Payments disbursed under this Act to Tribal Members shall be subject to withholding taxes which shall be withheld by the Tribe in accordance with all applicable Internal Revenue Service regulations.

SANMANCODESREVENUE.CH8

**EXHIBIT D**

1

**TRIBAL LABOR RELATIONS ORDINANCE**

September 14, 1999

2

3

4

**Section 1: Threshold of applicability**

5

(a) Any tribe with 250 or more persons employed in a tribal casino and related facility shall adopt this Tribal Labor Relations Ordinance (TLRO or Ordinance). For purposes of this ordinance, a "tribal casino" is one in which class III gaming is conducted pursuant to a tribal-state compact. A "related facility" is one for which the only significant purpose is to facilitate patronage of the class III gaming operations.

12

13

(b) Any tribe which does not operate such a tribal casino as of September 10, 1999, but which subsequently opens a tribal casino, may delay adoption of this ordinance until one year from the date the number of employees in the tribal casino or related facility as defined in 1(a) above exceeds 250.

18

19

(c) Upon the request of a labor union, the Tribal Gaming Commission shall certify the number of employees in a tribal casino or other related facility as defined in 1(a) above. Either party may dispute the certification of the Tribal Gaming Commission to the Tribal Labor Panel.

20

21

22

23

24

**Section 2: Definition of Eligible Employees**

25

26

(a) The provisions of this ordinance shall apply to any person (hereinafter "Eligible Employee") who is employed within a tribal casino in which Class III gaming is conducted pursuant to a tribal-state compact or other related facility, the only significant purpose of which is to facilitate patronage of the Class III gaming operations, except for any of the following:

27

28

29

30

31

32

33

(1) any employee who is a supervisor, defined as any individual having authority, in the interest of the tribe and/or employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment;

34

35

36

37

38

39

40

(2) any employee of the Tribal Gaming Commission;

2

1 (3) any employee of the security or surveillance department, other  
2 than those who are responsible for the technical repair and maintenance of  
3 equipment;

4 (4) any cash operations employee who is a "cage" employee or money  
5 counter; or

6 (5) any dealer.

7 **Section 3: Non-interference with regulatory or security activities**

8 Operation of this Ordinance shall not interfere in any way with the  
9 duty of the Tribal Gaming Commission to regulate the gaming operation in  
10 accordance with the Tribe's National Indian Gaming Commission-approved  
11 gaming ordinance. Furthermore, the exercise of rights hereunder shall in no  
12 way interfere with the tribal casino's surveillance/security systems, or any  
13 other internal controls system designed to protect the integrity of the tribe's  
14 gaming operations. The Tribal Gaming Commission is specifically excluded  
15 from the definition of tribe and its agents.

16 **Section 4: Eligible Employees free to engage in or refrain from**  
17 **concerted activity**

18 Eligible Employees shall have the right to self-organization, to form,  
19 to join, or assist employee organizations, to bargain collectively through  
20 representatives of their own choosing, to engage in other concerted activities  
21 for the purpose of collective bargaining or other mutual aid or protection,  
22 and shall also have the right to refrain from any or all such activities.  
23  
24

25 **Section 5: Unfair Labor Practices for the tribe**  
26

27 It shall be an unfair labor practice for the tribe and/or employer or  
28 their agents:

29 (1) to interfere with, restrain or coerce Eligible Employees in the  
30 exercise of the rights guaranteed herein;

31 (2) to dominate or interfere with the formation or administration of  
32 any labor organization or contribute financial or other support to it, but this  
33 does not restrict the tribe and/or employer and a certified union from  
34 agreeing to union security or dues checkoff;

35 (3) to discharge or otherwise discriminate against an Eligible  
36 Employee because s/he has filed charges or given testimony under this  
37 Ordinance;

1 (4) to refuse to bargain collectively with the representatives of  
2 Eligible Employees.

3  
4 **Section 6: Unfair Labor Practices for the union**

5  
6 It shall be an unfair labor practice for a labor organization or its  
7 agents:

8 (1) to interfere, restrain or coerce Eligible Employees in the exercise  
9 of the rights guaranteed herein;

10 (2) to engage in, or to induce or encourage any individual employed  
11 by any person engaged in commerce or in an industry affecting commerce to  
12 engage in, a strike or a primary or secondary boycott or a refusal in the  
13 course of his employment to use, manufacture, process, transport or  
14 otherwise handle or work on any goods, articles, materials, or commodities  
15 or to perform any services; or to threaten, coerce, or restrain any person  
16 engaged in commerce or in an industry affecting commerce or other terms  
17 and conditions of employment. This section does not apply to section 11;

18 (3) to force or require the tribe and/or employer to recognize or  
19 bargain with a particular labor organization as the representative of Eligible  
20 Employees if another labor organization has been certified as the  
21 representative of such Eligible Employees under the provisions of this  
22 TLRO;

23 (4) to refuse to bargain collectively with the tribe and/or employer,  
24 provided it is the representative of Eligible Employees subject to the  
25 provisions herein;

26 (5) to attempt to influence the outcome of a tribal governmental  
27 election, provided, however, that this section does not apply to tribal  
28 members.

29  
30 **Section 7: Tribe and union right to free speech**

31  
32 The tribe's and union's expression of any view, argument or  
33 opinion or the dissemination thereof, whether in written, printed, graphic or  
34 visual form, shall not constitute or be evidence of interference with, restraint  
35 or coercion if such expression contains no threat of reprisal or force or  
36 promise of benefit.

37  
38 **Section 8: Access to Eligible Employees**



4

1 (a) Access shall be granted to the union for the purposes of organizing  
2 Eligible Employees, provided that such organizing activity shall not interfere  
3 with patronage of the casino or related facility or with the normal work  
4 routine of the Eligible Employees and shall be done on non-work time in  
5 non-work areas that are designated as employee break rooms or locker  
6 rooms that are not open to the public. The tribe may require the union and  
7 or union organizers to be subject to the same licensing rules applied to  
8 individuals or entities with similar levels of access to the casino or related  
9 facility, provided that such licensing shall not be unreasonable,  
10 discriminatory, or designed to impede access.

11  
12 (b) The Tribe, in its discretion, may also designate additional  
13 voluntary access to the Union in such areas as employee parking lots and  
14 non-Casino facilities located on tribal lands.

15  
16 (c) In determining whether organizing activities potentially interfere  
17 with normal tribal work routines, the union's activities shall not be permitted  
18 if the Tribal Labor Panel determines that they compromise the operation of  
19 the casino:

20 (1) security and surveillance systems throughout the casino, and  
21 reservation;

22 (2) access limitations designed to ensure security;

23 (3) internal controls designed to ensure security;

24 (4) other systems designed to protect the integrity of the tribe's  
25 gaming operations, tribal property and/or safety of casino personnel, patrons,  
26 employees or tribal members, residents, guests or invitees.

27  
28 (d) The tribe shall provide to the union, upon a thirty percent (30%)  
29 showing of interest to the Tribal Labor Panel, an election eligibility list  
30 containing the full first and last name of the Eligible Employees within the  
31 sought after bargaining unit and the Eligible Employees' last known address  
32 within ten (10) working days. Nothing herein shall preclude a tribe from  
33 voluntarily providing an election eligibility list at an earlier point of a union  
34 organizing campaign.

35  
36 (e) The tribe agrees to facilitate the dissemination of information  
37 from the union to Eligible Employees at the tribal casino by allowing  
38 posters, leaflets and other written materials to be posted in non-public  
39 employee break areas where the tribe already posts announcements

5

1 pertaining to Eligible Employees. Actual posting of such posters, notices,  
2 and other materials, shall be by employees desiring to post such materials.

3

#### 4 Section 9: Indian preference explicitly permitted

5

6 Nothing herein shall preclude the tribe from giving Indian  
7 preference in employment, promotion, seniority, lay-offs or retention to  
8 members of any federally recognized Indian tribe or shall in any way affect  
9 the tribe's right to follow tribal law, ordinances, personnel policies or the  
10 tribe's customs or traditions regarding Indian preference in employment,  
11 promotion, seniority, lay-offs or retention. Moreover, in the event of a  
12 conflict between tribal law, tribal ordinance or the tribe's customs and  
13 traditions regarding Indian preference and this Ordinance, the tribal law,  
14 tribal ordinance or the tribe's customs and traditions shall govern.

15

#### 16 Section 10: Secret ballot elections required

17

18 (a) Dated and signed authorized cards from thirty percent (30%) or  
19 more of the Eligible Employees within the bargaining unit verified by the  
20 elections officer will result in a secret ballot election to be held within 30  
21 days from presentation to the elections officer.

22

23 (b) The election shall be conducted by the election officer. The  
24 election officer shall be a member of the Tribal Labor Panel chosen pursuant  
25 to the dispute resolution provisions herein. All questions concerning  
26 representation of the tribe and/or Employer's Eligible Employees by a labor  
27 organization shall be resolved by the election officer. The election officer  
28 shall be chosen upon notification by the labor organization to the tribe of its  
29 intention to present authorization cards, and the same election officer shall  
30 preside thereafter for all proceedings under the request for recognition;  
31 provided however that if the election officer resigns, dies or is incapacitated  
32 for any other reason from performing the functions of this office, a substitute  
33 election officer shall be selected in accordance with the dispute resolution  
34 provisions herein.

35

36 (c) The election officer shall certify the labor organization as the  
37 exclusive collective bargaining representative of a unit of employees if the  
38 labor organization has received the majority of votes by employees voting in  
39 a secret ballot election that the election officer determines to have been  
40 conducted fairly. If the election officer determines that the election was

6

1 conducted unfairly due to misconduct by the tribe and/or employer or union,  
2 the election officer may order a re-run election. If the election officer  
3 determines that there was the commission of serious Unfair Labor Practices  
4 by the tribe that interfere with the election process and preclude the holding  
5 of a fair election, and the labor organization is able to demonstrate that it had  
6 the support of a majority of the employees in the unit at any point before or  
7 during the course of the tribe's misconduct, the election officer shall certify  
8 the labor organization.

9  
10 (d) The tribe or the union may appeal any decision rendered after  
11 the date of the election by the election officer to a three (3) member panel of  
12 the Tribal Labor Panel mutually chosen by both parties.

13  
14 (e) A union which loses an election and has exhausted all dispute  
15 remedies related to the election may not invoke any provisions of this labor  
16 ordinance at that particular casino or related facility until one year after the  
17 election was lost.

18  
19 **Section 11: Collective bargaining impasse**

20  
21 Upon recognition, the tribe and the union will negotiate in  
22 good faith for a collective bargaining agreement covering bargaining unit  
23 employees represented by the union. If collective bargaining negotiations  
24 result in impasse, and the matter has not been resolved by the tribal forum  
25 procedures sets forth in Section 13 (b) governing resolution of impasse  
26 within sixty (60) working days or such other time as mutually agreed to by  
27 the parties, the union shall have the right to strike. Strike-related picketing  
28 shall not be conducted on Indian lands as defined in 25 U.S.C. Sec. 2703 (4).

29  
30 **Section 12: Decertification of bargaining agent**

31  
32 (a) The filing of a petition signed by thirty percent (30%) or more  
33 of the Eligible Employees in a bargaining unit seeking the decertification of  
34 a certified union, will result in a secret ballot election to be held 30 days  
35 from the presentation of the petition.

36  
37 (b) The election shall be conducted by an election officer. The  
38 election officer shall be a member of the Tribal Labor Panel chosen pursuant  
39 to the dispute resolution provisions herein. All questions concerning the  
40 decertification of the labor organization shall be resolved by an election

7

1 officer. The election officer shall be chosen upon notification to the tribe  
2 and the union of the intent of the employees to present a decertification  
3 petition, and the same election officer shall preside thereafter for all  
4 proceedings under the request for decertification; provided however that if  
5 the election officer resigns, dies or is incapacitated for any other reason from  
6 performing the functions of this office, a substitute election officer shall be  
7 selected in accordance with the dispute resolution provisions herein.

8  
9 (c) The election officer shall order the labor organization  
10 decertified as the exclusive collective bargaining representative if a majority  
11 of the employees voting in a secret ballot election that the election officer  
12 determines to have been conducted fairly vote to decertify the labor  
13 organization. If the election officer determines that the election was  
14 conducted unfairly due to misconduct by the tribe and/or employer or the  
15 union the election officer may order a re-run election or dismiss the  
16 decertification petition.

17  
18 (d) A decertification proceeding may not begin until one (1) year  
19 after the certification of a labor union if there is no collective bargaining  
20 agreement. Where there is a collective bargaining agreement, a  
21 decertification petition may only be filed no more than 90 days and no less  
22 than 60 days prior to the expiration of a collective bargaining agreement. A  
23 decertification petition may be filed anytime after the expiration of a  
24 collective bargaining agreement.

25  
26 (e) The tribe or the union may appeal any decision rendered after  
27 the date of the election by the election officer to a three (3) member panel of  
28 the Tribal Labor Panel mutually chosen by both parties.

29  
30 **Section 13: Binding dispute resolution mechanism**

31  
32 (a) All issues shall be resolved exclusively through the binding  
33 dispute resolution mechanisms herein, with the exception of a collective  
34 bargaining negotiation impasse, which shall only go through the first level of  
35 binding dispute resolution.

36  
37 (b) The first level of binding dispute resolution for all matters  
38 related to organizing, election procedures, alleged unfair labor practices, and  
39 discharge of Eligible Employees shall be an appeal to a designated tribal  
40 forum such as a Tribal Council, Business Committee, or Grievance Board.

8

1 The parties agree to pursue in good faith the expeditious resolution of these  
2 matters within strict time limits. The time limits may not be extended  
3 without the agreement of both parties. In the absence of a mutually  
4 satisfactory resolution, either party may proceed to the independent binding  
5 dispute resolution set forth below. The agreed upon time limits are set forth  
6 as follows:

7  
8 (1) All matters related to organizing, election procedures and  
9 alleged unfair labor practices prior to the union becoming certified as the  
10 collective bargaining representative of bargaining unit employees, shall be  
11 resolved by the designated tribal forum within thirty (30) working days.

12 (2) All matters after the union has become certified as the  
13 collective bargaining representative and relate specifically to impasse during  
14 negotiations, shall be resolved by the designated tribal forum within sixty  
15 (60) working days;

16  
17 (c) The second level of binding dispute resolution shall be a  
18 resolution by the Tribal Labor Panel, consisting of ten (10) arbitrators  
19 appointed by mutual selection of the parties which panel shall serve all tribes  
20 that have adopted this ordinance. The Tribal Labor Panel shall have  
21 authority to hire staff and take other actions necessary to conduct elections,  
22 determine units, determine scope of negotiations, hold hearings, subpoena  
23 witnesses, take testimony, and conduct all other activities needed to fulfill its  
24 obligations under this Tribal Labor Relations Ordinance.

25  
26 (1) Each member of the Tribal Labor Panel shall have relevant  
27 experience in federal labor law and/or federal Indian law with preference  
28 given to those with experience in both. Names of individuals may be  
29 provided by such sources as, but not limited to, Indian Dispute Services,  
30 Federal Mediation and Conciliation Service, and the American Academy of  
31 Arbitrators.

32 (2) Unless either party objects, one arbitrator from the Tribal  
33 Labor Panel will render a binding decision on the dispute under the  
34 Ordinance. If either party objects, the dispute will be decided by a three-  
35 member panel of the Tribal Labor Panel, which will render a binding  
36 decision. In the event there is one arbitrator, five (5) Tribal Labor Panel  
37 names shall be submitted to the parties and each party may strike no more  
38 than two (2) names. In the event there is a three (3) member panel, seven (7)  
39 TLP names shall be submitted to the parties and each party may strike no  
40 more than two (2) names. A coin toss shall determine which party may

9

1 strike the first name. The arbitrator will generally follow the American  
2 Arbitration Association's procedural rules relating to labor dispute  
3 resolution. The arbitrator or panel must render a written, binding decision  
4 that complies in all respects with the provisions of this Ordinance.

5  
6 (d) Under the third level of binding dispute resolution, either party  
7 may seek a motion to compel arbitration or a motion to confirm an  
8 arbitration award in Tribal Court, which may be appealed to federal court. If  
9 the Tribal Court does not render its decision within 90 days, or in the event  
10 there is no Tribal Court, the matter may proceed directly to federal court. In  
11 the event the federal court declines jurisdiction, the tribe agrees to a limited  
12 waiver of its sovereign immunity for the sole purpose of compelling  
13 arbitration or confirming an arbitration award issued pursuant to the  
14 Ordinance in the appropriate state superior court. The parties are free to put  
15 at issue whether or not the arbitration award exceeds the authority of the  
16 Tribal Labor Panel.